CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

JANUARY TERM, 1874, AT JEFFERSON CITY.

[CONTINUED FROM VOL. LIV.]

JOHN L. SITZ, *et al.*, Respondent, *vs.* JOSEPH DEIHL, Appellant.

1. *Vendor's lien—Deed, reserving—Note for unpaid purchase money—Misdescription of, in deed—Purchase with notice of lien, etc., etc.*—A. made a written agreement with B. to sell him certain land, for a given sum of money and the assumption by B. of certain incumbrances upon the land. Accordingly, A. and his wife executed their deed for the land. The deed referred to the encumbrances and contained a clause, reserving to the grantor a vendor's lien for the unpaid purchase money. The note given for the amount fell due in July, but was described in the deed as maturing in August. B. afterward made a deed of trust on the land to secure the prior encumbrances, and sold the same to C., who purchased with notice of the vendor's lien. *Held*, 1: that C. took the land, subject to the vendor's lien. 2: that the note was merely evidence of the debt, and an improper description of the note in the deed would not affect the lien. 3: that evidence identifying the note as given forthe purchase money was competent. 4: it was not material that the notewas made payable to A.'s wife and not to A. himself.

Appeal from Moniteau Circuit Court.

Moore & Williams, for Appellant.

I. The sale of the real estate, &c., by William's trustee was valid and binding upon the mortgagor and all persons claiming under or in privity with him; and no subsequent or subsidary lien to those, under which the sale was made was binding on the defendant, Zeibold, or on the property. (2 Wagn. Stat., § 13, p. 956.)

a. The plaintiffs were the original mortgagors of this property for the payment of the debts for which it was sold, and the defendant, Deihl, made a deed of trust to plaintiffs' creditors to secure the same debts; either of which acts extinguished any lien the plaintiffs could have reserved. (Bayley vs. Greenleaf, 7 Wheat., 46; Sto. Eq. Jur., § 1248; Taylor vs. Baldwin, 10. Bar., 626; Roberts vs. Rose, 2 Humph., 145.)

II. The written agreement between the plaintiff, J. M. Sitz and Joe. Deihl for the sale of the one-half interest in the mill, and that subsequently made in pursuance thereof, should be taken together as one entire contract. (Hill. Vend., pp. 16, 17, also p. 167, 3rd Ed.)

b. The intention of the parties at the time of the sale has never been changed by any subsequent convention or agreement between them. The evidence shows that no lien was intended to be reserved in favor of plaintiffs, and there is nothing in the case to justify the court in changing the clear intention of the parties. (Bayley vs. Greenleaf, 7 Wheat. p. 46.)

III. Zeibold purchased the property at its full value at the trustee's sale, made for the payment of the debts, which were a lien upon the property at the time of the sale, by plaintiff to defendant, Deihl, and these debts were all prior to the pretended vendor's lien; and, although the notes were renewed and renewed mortgages given for the debts, they were never paid off, and this property remained and continued throughout a primary fund for the payment of such indebtedness. (2 Washb. Real Pr. [2 Ed.] p. 605; 2 Sto. Eq. Juris., §§ 1244 to 1248 inclusive; Schmitt vs. Stanley, 37 Mo. 11; Dunshee vs. Parmelee, 19 Verm., 172; Boyd vs. Beek, 29 Ala., 703; Enston vs. Friday, 2 Rich. [S. C.] 427; Smith vs. Price, 14 Conn., 472.)

IV. The plaintiff, Elizabeth Sitz, having no vendible interest in the property, can have no vendor's lien. (Learned vs. Cutter, 18 Pick., 9; 1 Washb. Real Pr. [2nd Ed.], p. 248.) On a sale of property, the lien ensues to the owner of the fee. Here Mrs. Sitz, the payee of the note, is not the assignee of the note, even if she be an assignee of the debt; and it "is doubtful whether the assignee of a note given for the purchase money, acquires, by such assignment, the lien which the vendor had. (Durette vs. Briggs, 47 Mo., 356—362.)

There is no case in this State, in which a lien has been declared in favor of any other party than the vendor, when a deed has been given; and the weight of authority generally, is against the reservation of such lien to third parties or an assignee. (2 Sugd. Vend., 351; Stansell vs. Roberts, 13 Ohio, 148; Skaggs vs. Nelson, 25 Miss., 88; Bush vs. Kinsley, 14 Ohio, 20.)

V. The plaintiffs made a conveyance of the legal title, and did not give a bond to convey. Hence no lien could be reserved to Mrs. Sitz. (Adams vs. Cowherd, 30 Mo., 460.)

VI. Neither Williams, the trustee, nor Zeibold knew of the existence of the note sued on.

VII. Had there been, in fact, a vendor's lien reserved, the plaintiffs should have first resorted to a court of law against Jo. Deihl, the maker of the note, before resorting to a court of equity against the land. (2 Sugd. Vend., 345-7, 351; 1 Gill and Johnson, Ch. R., 495; Bottorf vs. Connel, 1 Blackf., 287; Roper vs. McCook, 7 Ala., 318.)

Gordon, Draffin & Muir, for Respondents.

I. By the deed from Sitz and wife to Joseph Deihl, a lien was reserved on the land conveyed for the balance of the purchase money. This deed was on the record at the time Zeibold, the appellant, purchased the land at trustee's sale. The appellant, therefore, had constructive notice of the lien, and we insist that he also had actual notice at the time of his purchase.

II. The rights of the plaintiffs against the land were not impaired, in consequence of the fact that the fifteen hundred

dollar note was made payable to a married woman. The law regards it as the note of her husband. (Sto. Prom. Notes, § 87; Honore's Exrs. vs. Bakewell, 6 B. Monr., 71.)

ADAMS, Judge, delivered the opinion of the court.

This was an action to enforce a vendor's lien for a balance of purchase money against real estate in Moniteau County, which resulted in judgment in favor of the plaintiffs, from which the defendants have appealed to this court. The leading facts are as follows:—

The plaintiffs are husband and wife. The plaintiff, John M. Sitz, was the owner in fee of the lands in dispute, upon which there existed a large amount of encumbrances, created by him. In June, 1868, he entered into a written agreement with the defendant, Joseph Deihl, to sell him the lands, and the price agreed on was twenty-five hundred dollars, to be paid in money and the assumption and payment, by Deihl, of the encumbrances referred to Afterwards, in January, 1869, the plaintiff and his wife, in performance of his part of the agreement, executed and delivered to Deihl a deed in fee for the lands. One thousand dollars of the purchase money was paid, and the remainder, being fifteen hundred dollars, remained unpaid, for which an express lien is reserved in the deed, in the following language: "This deed to be in full force and effect after the payment of one certain note, due July, 1870, for fifteen hundred dollars, being a part of the purchase money of said property, and to be a vendor's lien on said property described in this deed." The encumbrances, which were to be paid by the vendee, are referred to in the deed and excepted from the covenants for title. This deed was duly acknowledged and recorded in Moniteau County. The vendee, Deihl, afterwards made two deeds of trust on this real estate, to secure the creditors, holding the prior encumbrances; and, under these deeds of trust, the lands were sold, and, by an arrangement among themselves, one of the creditors bid off the land at seven thousand and eighty dollars. In making that bid, it was understood by all parties, that the fifteen hundred dollars, mentioned in

the deed to Deihl, was a prior lien and the bid was made subject to that lien. After the lands were bid off, the creditors agreed that the defendant, Gottlieb Zeibold, might take the lands at that price, and he was substituted as the bidder, and the deed was made to him by the trustee.

The evidence shows that, at the time Zeibold purchased, he had been told of the vendor's lien as an existing prior lien. When the deed to Deihl was made, a note for the fifteen hundred dollars which had been executed to the plaintiff, Mrs. Sitz, for the balance of the purchase money, was misdescribed in the deed as being due in July, 1870, instead of August, 1870. The evidence to establish the identity of the note, as given for the unpaid purchase money, was clear and satisfactory, but was objected to by the defendants as incompetent.

From the facts here detailed, it is plain to my mind that the defendant, Zeibold, being a purchaser with notice, took the lands subject to the prior lien for the unpaid purchase money. The face of the deed to Deihl manifested the reservation of the vendor's lien and the amount of it. As this deed was upon record, he was bound to take notice of the reservation. But he not only had constructive notice, by means of the record, but purchased with express notice that this lien existed and had to be paid. There is nothing in the point that the note given for the purchase money was executed to the vendor's wife. The authority to reduce the debt to his possession as his own, results from his marital rights. Besides this was an express lien, reserved in the deed, and, no doubt, may be transferred or made payable to a third person. Whether an implied vendor's lien can be transferred by transferring the debt will not be discussed or passed upon as the point is not in the record.

The note was only evidence of the debt for the unpaid purchase money, and whether the note was properly described in the deed or not, would not affect the lien. The lien was for the purchase money, and this suit was to enforce that lien. I see no valid objection to the proof to identify the note. There was no attempt to alter or vary it or the deed, but merely to

show that the consideration of the note was the purchase money mentioned in the deed.

On the whole case, the judgment seems to be for the right party. Let it be affirmed. The other judges concur.

PRISCILLA H. FOSTER, Respondent, *vs.* LEVI R. BRESHEARS AND JOEL B. HOLBERT, Appellants.

1. *Evidence—Records—Registry acts for bona fide purchasers.*—The doctrine of this State is that the registry acts were enacted in favor of *bona fide* purchasers and mortgagees.

Appeal from Hickory Circuit Court.

Phelps & Kraft and Bray & Cravens, for Appellants.

Waldo P. Johnson, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for lands in Hickory county, consisting of an eighty acre tract, and a quarter section of one hundred and sixty acres. There was no dispute as to the plaintiff's right to recover the eighty acres. The contest was in regard to the quarter section. Both parties claimed title through James E. Foster, from James Dunn, Jr., as the common source of title. The plaintiff stood upon the following chain of title.

1. A deed from James E. Foster, to herself, duly executed and acknowledged on the 5th day of August, 1869.

2. A deed from James Dunn, Jr., to said James E. Foster, duly executed and acknowledged on the 4th day of February, 1858. Neither of which deeds was recorded till after the commencement of the suit. The suit was commenced on the 26th day of August, 1869, by filing the petition on that day. The summons was not issued till in November, and served in December, 1869.

The defendant Breshears, relied on the following chain of title:

1. A deed from his co-defendant Holbert, duly executed and acknowledged on the 28th day of September, 1867, and recorded on the 6th day of January, 1868.

2. A sheriff's deed to Holbert, dated the 5th day of May, 1864, and acknowledged in May, 1870, from the recitals of which it appears, that the sale was made during a session of the County Court, under an execution issued on a judgment of the County Court, rendered against James E. Foster, on the 16th day of December, 1862, in favor of Hickory county, to the use of school township, No. 1 of said county, for principal and interest of a school debt,

3. A quit claim deed executed to the defendant Holbert, by James Dunn, Jr., on the 16th day of November, 1869, and duly acknowledged on that day.

The evidence showed that when Holbert applied to Dunn, for the quit claim deed, he told him that he had no claim to the land; Holbert replied that the record showed no deed from him, and he then executed a quit claim. The case was submitted to the court sitting as a jury, and the court found for the plaintiff, and gave judgment accordingly.

The judgment is for the right party. It is conceded here by both parties, that the sheriff's deed to Holbert, conveyed no title. The only point raised and relied on for reversal, is that, the quit claim deed from Dunn to Holbert, which was made without any valuable or good consideration, conferred the title on him, under our registry acts.

What took place between Dunn and Holbert, when he took the quit claim deed, amounted to actual notice of the prior unrecorded conveyance by Dunn to Foster. Dunn told him he had no title, and under the circumstances that deed could only convey such title as he had. The doctrine in this State is that the registry acts were enacted in favor of *bona fide* purchasers and mortgagees. (Davis vs. Ownsby, 14 Mo., 176; McCamant vs. Patterson, 39 Mo., 110; Aubuchon vs. Bender, 44 Mo., 560.)

Let the judgment be affirmed. The other judges concur.

WALTER S. SKEEN, Plaintiff in Error, *vs.* ABRAHAM JOHNSON, *et al.*, Defendants in Error.

1. *Curator—Action against, by widow for child's share—Remedy, form of, etc.*—Suit, in the nature of an action for money had and received by a widow against the curator of her minor children, for her child's share (Wagn. Stat., 539, § 4) of certain funds, which had been paid over by the administrator to the curator will not lie. Where she fails to claim the amount till it has passed from the administrator to the curator, *semble* that her only remedy would be a bill in equity, conjoining all persons in interest as parties, and adjusting their respective rights by appropriate decrees.

Error to Maries Circuit Court.

Ewing & Smith, for Plaintiff in Error.

I. An action for money had and received, lies wherever money has been received by the defendant, which *ex equo et bono*, belongs to the plaintiff, whether there is any privity between the parties or not. (Kuntz vs. Livingstone, 15 Cal., 344; Cary vs. Curtis, 3 How., [U. S.] 235; Prett vs. Ide, 3 Blackf., 240; Stratton vs. Rastall, 2 T. R., 370; Moses vs. McFerlane, 2 Bull., 1008; McLean vs. Martin, 45 Mo., 393.)

II. The statute fixes the rights of the parties. When children, by their curator, received all the money of their father's estate, to the exclusion of the mother, who is entitled by statute to one-fourth of the whole, or a child's part, can she not pursue this fund, and cannot her claim be allowed against the children's estate, and cannot the Circuit Court, in the exercise of its general jurisdiction, ascertain and determine the rights of all the parties?

G. W. Miller, for Defendants in Error.

I. Johnson is answerable, under his bond, to said minors for the amount in his hands, and if any mistake has been made by the administrator and the County Court, ought not the plaintiffs to seek a remedy in that direction, and not bring a proceeding against the curator, who has violated no duty imposed upon him?

SHERWOOD, Judge, delivered the opinion of the court.

James Hoffman died, seized of a considerable amount of property, both real and personal, and, upon the final settlement of his estate there remained, in the hands of the administrator thereof, subject to distribution, the sum of $5,107.72.

The decedent left at his death a widow and three minor children. The widow has intermarried with her co-plaintiff Walter S. Skeen. No order for the distribution of the assets, remaining in the hands of the administrator, was made. Abraham Johnson, the defendant, at the term next following the final settlement, was appointed curator of the estate of said minors, and gave bond as such curator, and to him the administrator paid over the above mentioned sum of money.

This action was brought by the widow, now Mrs. Skeen, and her present husband, against the defendant, Johnson, as curator, &c., to recover from him, on behalf of Mrs. Skeen, as widow and relict of the decedent, the sum of $1,276.93, as a child's share of the sum paid over to the curator by the administrator.

To the petition, alleging, in substance, the above recited facts, the defendant demurred, assigning among other grounds, that the petition did not state a cause of action. The demurrer was successful, and the plaintiffs have brought this cause here on writ of error.

This action, it will be at once perceived, is in its essential features, an action for money had and received. Such action, however, cannot be maintained, except where the law will imply a promise to pay; but the law will never imply such promise, except where it is the duty of the party, who holds the fund, to make the payment, and where it is not unjust nor inequitable to the party to whom the promise is thus imputed, to so imply it.

In the present instance, the curator, having, as shown by the petition itself, received and given bond for the money as the property of the minors and, as their curator, it would be a manifest breach, both of his bond and of his official duty, to make any disbursements of the trust fund placed in his hands, except for the benefit of his wards. With the widow and her claims, he

has no concern; his duties and obligations run in an altogether different channel, and are exclusively centered in, and confined to, those whose interests are entrusted to his care.

Under such circumstances, there would be no natural justice or equity in implying a promise on the part of the curator, to disburse to the widow any portion of the fund, which he had received and is accountable for, as the money of the minors. (Cary vs. Curtis, 3 How., [U. S.] 236; Com. on Cont., 316, *et seq.*)

As it would, evidently, contravene the duty of the curator to make the payment demanded, it must follow that the implied promise, which rests solely upon a duty to be performed as its basis, can have no existence, and, therefore, that the plaintiffs' action must fail; and their petition be held here, as it was in the court below, insufficient.

It may not be amiss to add, in conclusion, that if Mrs. Skeen has never received her share of the personal estate of her former husband, to which she is entitled under § 4 of the Dower Act, that she is still entitled thereto. But, inasmuch as she has delayed in asserting her rights until the funds belonging to the estate have passed into the hands of the curator and been commingled with the funds of the minor heirs, perhaps her only remedy now consists in a proceeding in the nature of a bill in equity, all persons in interest being made parties, and their respective rights to the fund in question adjusted by an appropriate decree.

Judgment affirmed. All concur.

JOHN G. BECK, Respondent, *vs.* HENRY POLLARD, Appellant.

1. *Practice, civil—Court—Jury—Instructions.*—Where parties leave the court to find the facts, it is useless to multiply instructions.
2. *Practice, Supreme Court—Evidence—Chancery.*—Generally the Supreme Court has no power to review facts except in chancery cases.

Appeal from Moniteau Circuit Court.

Durham and Sangree, for Respondent.

Crandall and Sinnet, for Appellant.

NAPTON, Judge, delivered the opinion of the court.

This suit was brought by a justice of the peace, to recover eighty-six dollars, on account of some flour sold by the firm of Puckett & Pollard, against Pollard, one of said firm. The plaintiff obtained a judgment and an appeal was taken to the Circuit Court.

The facts about which there was no dispute, seem to have been, that the plaintiff engaged in the business of buying and selling wheat at Dresden, a small town on the Pacific R. R. of about 250 inhabitants; and, living himself in the country, about four miles distant from the town, he made one Schu, his agent, to attend to this business. In 1868, Pollard, the defendant, engaged in the mercantile business in Dresden, in copartnership with Puckett, under the firm name of Puckett & Pollard. In December of that year the flour referred to in the account was left with said firm, for sale on commission by Schu. This flour was the proceeds of wheat owned by the plaintiff, and his agent Schu was directed to have it ground and the flour sold by some merchant, at a specified price with a commission of 50 cents a sack. It was sold; and this suit brought to recover the amount of the sales minus the commission.

Up to this point, there was no dispute about the facts. The defendant insisted, however, that the proceeds were accounted for by paying drafts drawn by Schu on his individual account; and by a bill of merchandise, he had bought of the firm; and further, that upon the proposed dissolution of the firm, they had sent for Schu and offered to pay him in money for the flour, but that he preferred transferring the claim to Pollard, the defendant, who had bought out Puckett, and that in this way the debt for the flour was extinguished. The plaintiff claimed that the firm of Puckett & Pollard well understood that the flour was his, and did not belong to Schu, and of course they could not extinguish the debt by any allowance to Schu

on his individual indebtedness. And this was really the point in dispute. It was a question of fact for a jury or for the court, if the parties chose to waive a jury.

It is useless, in our view of the case, to state the evidence. Three or four witnesses clearly proved that the defendant knew the flour belonged to plaintiff and not to Schu. About as many witnesses testified to the contrary. It was a question of credibility and probability inferential from the facts. The only question we can examine is as to the propriety of the instructions—or rather the declarations of law—which the court made as governing the case. The court refused to declare the law as asked by plaintiff, that if the agent or factor, used the flour to pay his individual debts to defendant, Pollard, whether the said Pollard was informed of the relations existing between Beck and Schu, or not, the plaintiff was entitled to recover; but declared the law to be, that if defendant, his partner or employer was aware of the fact that the flour belonged to plaintiff, the plaintiff was entitled to recover. And this instruction given and the one refused embrace the point really in the case; and surely the one given cannot be objected to.

There were other instructions given on the abstract relations of principal and agent, and there were several refused which were perfectly unnecessary where a case is left to the court as a jury. The instructions refused are doubtless correct law; but the court regarded them as inapplicable to the facts proved. They might have been given, but on the finding of the court they became useless. And where parties leave the court to find the facts, it is useless to multiply instructions. The instructions refused, merely lead to the conclusion that the court sitting as a jury, did not consider that the hypothetical facts on which they were based were sustained by the evidence. And this court has no power of review of a finding of facts, except in chancery cases. It is useless to cite cases to prove that a factor cannot pay off a debt to his principal by procuring its extinguishment through his individual indebtedness, when his relation to his princi-

pal is fully known and understood by the parties to the transaction.

Judgment affirmed; the other judges concur.

J. H. JEFFRIES, Respondent, *vs.* C. L. FLINT, Appellant.

1. *Practice, civil—Note, non-filing of—Continuance—Production of note, &c.*—Where suit is brought, by a subsequent indorser against one who is the payee and prior indorser of a note, the non-filing of the note with the original petition constitutes no ground for granting a continuance to defendant. Section 51, Art. VI of the Practice Act (Wagn. Stat., 1022) has no application to such a case. Where an inspection of the note, referred to in the petition, is necessary to enable defendant to prepare his defense, §§ 36, 37, Art IX of said act (Wagn. Stat., 1044) point out the proper way in which to procure its production.
2. *Practice, Supreme Court—Death of party—Administrator, substituted how.*—Where defendant dies, pending an appeal in the Supreme Court, his administrator cannot be substituted in his stead, on motion of the adverse party. Such substitution can be made only on the voluntary appearance and consent of the administrator, or after service and summons issued for the purpose of *revivor* on him.

Appeal from Phelps Circuit Court.

Seay & Williams, for Respondent.

C. C. Bland, for Appellant.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the Phelps Circuit Court brought by J. H. Jeffries, as subsequent indorser, against C. L. Flint, as payee and prior indorser of a promissory note, made payable to the order of said Flint by one Griffin, the maker, at the banking house of Ward & Bros., Bankers, in the City of Rochester and State of New York. At the return term of the writ, the defendant filed his answer and the cause was continued to the next term. At that term the defendant withdrew his answer and filed his demurrer to plaintiff's petition, which was adjudged insufficient. Plaintiff thereupon filed his amended petition. On the fourth day after the amended petition was

filed, the defendant, without having answered or demurred to the amended petition, made an application for a continuance of the cause, on the alleged ground, that, as the "note sued on" was not filed with the original petition, "it was never definitely and certainly known to him, upon what this action was based, until during the present term of this court;" that he could not tell on what note he was sued, and therefore, could not take the depositions of his witnesses, all of whom resided in the State of New York, in support of his meritorious defense, &c., &c.

This application was very properly overruled, as it proceeded upon the assumption that the statutory provision requiring certain instruments to be filed, was applicable to the case at bar. While it is true, in one sense, that this suit has for its foundation the promissory note mentioned in the petition; yet it is equally true that § 51, p. 1022, 2 Wagn. Stat., referred to by appellant's counsel as being in point, has not the slightest application here; as that section applies exclusively to suits founded upon any instrument of writing, charged to have been executed by the other party; *i. e.*, the party who is sued. Consequently, the non-filing of the note with the original petition, constituted no ground whatever for granting a continuance; the application for which had its origin either in an utter misapprehension of the meaning of the statute, or else in the desire to frame some flimsy pretext, wherewith to stave off a trial. If an inspection of the note referred to in the original petition, were absolutely necessary, in order for the defendant to properly prepare for his defense, §§ 36, 37, 2 Vol. Wagn. Stat., p. 1044, point out the appropriate way, whereby the production of papers, not necessary to be filed with the pleadings, can be secured.

On the overruling of his application, the defendant excepted and thereupon filed his demurrer to the amended petition, urging the insufficiency thereof on the ground already considered, that the note, referred to therein, was not filed therewith; that there was no averment of notice to defendant, nor that plaintiff paid any consideration for the note, &c., &c.

Having already discussed the point as to the failure to file the note with the petition, I will not further notice it. As to the other grounds, lack of notice and of consideration paid for the note, the petition, though somewhat inartificially drawn, sufficiently avers both. Since the appeal was taken in this cause, the defendant has died, and his death is here suggested by the attorney who formerly represented him, and it is asked that, Charles N. Flint and Elizabeth Flint, who have been appointed respectively administrator and administratrix of the estate of the decedent, be substituted in the room and stead of their said intestate. But such substitution can only be had in the mode pointed out in the statute; *i. e.* when made upon the voluntary appearance and consent of the adverse party, or after service of summons, issued for the purpose of revivor on such party. (See §§ 1, 2, 3, 2 Wagn. Stat., p. 1049.) And the same rule in this regard prevails in this, as in the Circuit Court. (§ 30, p. 1067, 2 Wagn. Stat.)

As the plaintiff, however, has consented to the revivor asked, and has entered here in his voluntary appearance, the action will stand revived against the aforesaid legal representative of the said decedent defendant.

Judgment affirmed. All concur.

CLEMENT COATS, Respondent, *vs.* W. J. SWINDLE, Appellant.

1. *Promissory notes—Signature as surety—Proof as to—Request by surety to sue—Allegation as to.*—In suit upon a promissory note *Held:*

1st. That it was competent for defendant to show that he signed as surety;

2nd. That an averment in his answer that defendant had requested plaintiff to sue the maker was sufficient without the further allegation that the request was in writing;

3rd. That evidence, showing a verbal agreement between them, at the date of the note that plaintiff should promptly proceed to coerce payment, was incompetent.

Appeal from Jasper Circuit Court.

Garrison & Allen, for Appellant.

I. In the case at bar the respondent agreed to bring his action at once, and made some effort in that direction. This was sufficient to show that he waived a notice in writing.

II. Under our rules of pleading, we were not required to set out in the answer that the notice was in writing. It was a question of evidence whether the notice was in writing.

III. We have searched in vain to find any authority that would preclude us from proving a verbal agreement between the respondent and appellant. Surely the statute of frauds would not do so, because this contract was to be performed immediately.

IV. Respondent by agreeing to bring his action immediately and making some efforts in that direction, and then waiting over one year, leading the appellant to suppose that the note was paid by Reinmiller, is now equitably estopped from saying that the notice was not in writing. Courts of equity always enforce parol contracts and agreements where they have been accepted and acted upon by either party.

W. H. Phelps, for Respondent.

I. The notice to discharge surety must be in writing. (Sapington vs. Jeffries, 15 Mo., 628; Freligh vs. Ames, 31 Mo., 253; Wagn. Stat., § 1, p. 1302.)

Wagner, Judge, delivered the opinion of the court.

The plaintiff brought his action against the defendant, and one Reinmiller on a promissory note. The defendant answered; and as matters of defense alleged that he signed the note as surety; that after the note became due, and more than thirty days before the institution of this suit, he requested the plaintiff to bring suit on the note; and he also stated that there was an agreement between the plaintiff and the defendant at the time the note was given that the former should proceed promptly to coerce the payment of the same.

At the trial the defendant offered to prove that he was only surety on the note and that, at a time more than thirty days before the action was brought, he notified the plaintiff in writing to bring his action on the note. The

court refused to permit the defendant to introduce any evidence, on the ground that the answer constituted no defense to the action, because it was not stated therein that the notice to sue was given in writing.

It has frequently been decided and the rule is settled that it is perfectly competent for a surety to show in what capacity or character he signed a note.

The answer averring that the defendant requested the plaintiff to sue was sufficient. It was not necessary to plead that the request was in writing, that was a matter to be shown by the evidence. The statute requires that the requisition should be in writing, but it is sufficient if the pleading alleges the fact of notice and then it must be shown by the evidence that the statute has been complied with.

The third defense set up in the answer was not admissible in evidence. It proposed to substitute verbal testimony where the law says written testimony is necessary. And in addition thereto any mere arrangement or understanding between the parties at the time the note was signed must be considered as merged in the written contract. But for the error in refusing to permit evidence to be given as to the defendant's being a surety, and giving the notice to sue in writing, the judgment must be reversed and the cause remanded.

The other judges concur.

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ADAM HOWENSTEIN, Respondent, *vs.* PACIFIC R. R. Co., Appellant.

1. *Railroads—Crossing—Killing of stock—Prima facie case—How made out—How rebutted.—Double damages.*—Proof that stock were killed at a road crossing by a railroad train and that the bell was not rung, and the whistle not sounded, for an interval of eighty rods from the crossing, as required by statute, (Wagn. Stat., p. 310, § 38,) is sufficient to make out a *prima facie* case against the company, without further evidence that its employees and servants were guilty of negligence which caused the damage. In order to free itself from liability, the company must show that it has discharged every duty imposed by law; unless it be shown that the injured party has in some

way contributed to the injury, or the circumstances rebut the presumption that the injury resulted from neglect of duty on the part of the company. In suit under the above statute, judgment for double damages would be improper.

Appeal from Johnson Court of Common Pleas.

J. N. Litton, for Appellant.

I. The burden is on the plaintiff to establish, that the neglect to ring the bell was the cause of the injury to the horses. The mere fact that the bell was not rung, does not of itself prove that, if it had been, the horses would not have been struck. There must be affirmative evidence of that fact. That is not only the law, but was the well settled construction of this statute when it was adopted. (See 1 Redf. Railw., p. 480, § 29; Ill. R. R. Co. vs. Phelps, 29 Ill., 447; Galena R. R. vs. Loomis, 13 Ill., 548; Galena R. R. vs. Dill, 22 Ill., 266; Mich. & South. R. R. vs. Fisher, 27 Ind., 96.)

II. What a jury might have inferred from the circumstances of the case cuts no figure in this case, because all the facts are admitted of record, and when that is the case the questions are entirely of law. (See 50 Mo., 44; also Barton vs. I. M. R. R., 52 Mo., 253.)

Ewing & Smith, for Respondent.

Vories, Judge, delivered the opinion of the court.

This action was commenced before a justice of the peace, where judgment was rendered for the plaintiff. From that judgment the defendant appealed to the Johnson Court of Common Pleas, where judgment was again rendered in favor of the plaintiff, from which the defendant appealed to this court.

The cause of action filed before the justice charges that the defendant is a body corporate, and upon the 24th day of October, 1870, was the owner of a certain railroad known as the Pacific Railroad, together with locomotives, cars, etc.; that on said day, while two horses, the property of the plaintiff, and of the value of $150, were traveling along the public highway, from the house of plaintiff to their pasturing grounds

on the commons,which said highway is known as the Patrick road,and crosses said railroad at or near the western boundary line of the town of Warrensburg, in the county of Johnson, and as said horses had reached said crossing, the defendant carelessly and negligently caused one of its locomotives with a train of cars attached thereto, to approach said crossing and pass rapidly over the track of said railroad, carelessly and negligently omitting, while so approaching said crossing, to give any signal, by ringing the bell of said locomotive or sounding the steam whistle thereon, as required by the 38th section of chapter 63, of the General Statutes of the State of Missouri; that by reason of said negligence of the defendant, and without any fault or negligence on the part of the plaintiff, the said locomotive struck plaintiff's said horses and wounded and killed the same until they were of no value whatever, by which plaintiff was damaged and judgment is prayed for the sum of $150.

It is admitted by the parties that the following statement comprehends all of the material evidence in the cause, to-wit: "that the defendant is an incorporated company, as charged, and was the owner of and operating said Pacific railroad at the time of the wounding and killing of plaintiff's horses; that on the night of the killing and wounding (October 24th, 1870,) the evening passenger train going east, while passing with usual speed along said road, omitting to ring the bell or blow the whistle while approaching that point on said railroad where what is known as the Patrick road—a public highway—crosses said railroad, and did pass over said crossing without ringing the bell or blowing the whistle; that the crossing is about one-fourth of a mile from the depot at Warrensburg; that the train going east is on a heavy up-grade; that a short time after said train passed over said crossing the horses of plaintiff were found by the side of the railroad track, one of them dead, and the other injured to such an extent as to be worthless; that the horses had the appearance of having been struck by the locomotive; that the horses were at the time running at large; that said Patrick road crossed said railroad

at a point near and within the western limits of the town of Warrensburg, in the township of Warrensburg, Johnson county, State of Missouri; that the horses were of the reasonable value of $150, and were the property of the plaintiff."

This being all the evidence in the case, the court at the request of the plaintiff, declared the law to be as follows:

"That if it is proved by the evidence that the horses referred to were the property of the plaintiff, and they were struck by the locomotive or cars of defendant, and injured to such an extent as to kill one and wound another, then the verdict must be for the plaintiff, if it is also proved that the bell attached to the locomotive engine was not rung at least at a distance of eighty rods from the place where the said Pacific Railroad crosses said Patrick road and kept ringing until it crossed said road or street, or that the steam whistle attached to said engine was sounded at least eighty rods from said crossing, and sounded at intervals until said Patrick road was passed."

The defendant objected to said declaration of law and the objection being overruled, excepted.

The court, at the request of the defendant, declared the law as follows:

1. "If the court hearing the cause should believe from the evidence that the animals strayed upon the track of defendant, within the corporate limits of Warrensburg, and were injured or killed, yet the defendant is not liable for damages for the injury or killing of the animals by one of its locomotives, engines or cars upon a crossing of a public street or at any other point upon the track within the corporate limits of said town, unless the owners of such locomotive, engine or cars were guilty of negligence."

2. "The law does not require the defendant to erect and maintain fences on either side of the track within the corporate limits of towns or cities."

3. "If the court should find from the evidence that the engineer in charge of the locomotive at the time the animals were injured and killed did not ring the bell or sound the

whistle attached to the locomotive within eighty rods of the place where said railroad crosses the road or street in said corporation, on which said animals may have been injured or killed, even then the court will find for defendant, unless the plaintiff shall prove that the damages sustained by him in the killing and injuring of the animals was occasioned by the failure of the engineer to ring the bell and sound the whistle."

4. "Although the court shall find from the evidence that said animals were on the road-bed of defendant, and were in some way injured and killed at or near said bed, yet that is not enough within itself to subject the defendant to damages for such injury and killing, unless it is further proved to the satisfaction of the court sitting in trial of the cause as a jury, that said animals were actually struck by the locomotive or cars and thereby injured and killed."

The court found the issues for the plaintiff and assessed the value of the horses at $150, and rendered a judgment in plaintiff's favor for $300, double the amount of the damages found.

The defendant then filed a motion for a new trial, stating as cause therefor, that the court had wrongly declared the law and that the judgment was against both the law and the evidence. This motion was by the court overruled, and the defendant excepted and appealed to this court.

The only question presented for consideration in this court, grew out of a declaration of law given by the court, and out of the fact that the court rendered a judgment for double damages. It is insisted by the defendant, that it was not sufficient on the part of the plaintiff for him to show that the defendant in approaching a road crossing omitted to ring the bell or sound the whistle, and that the plaintiff's horses were killed by the locomotive at said crossing; but that the plaintiff must also affirmatively show by the evidence that the servants of defendant were guilty of negligence and that it was the negligence thus committed, that caused the injury to plaintiff's horses. It is therefore insisted, that the first declaration of law made by the court was improper, as the court omitted to declare therein that the negligence of the defendant must have caused the injury in order to make the defendant liable.

If the position taken by the defendant were true, then by taking the declaration of law given for the plaintiff in connection with the first declaration made at the request of the defendant it would be proper; but I do not think that the position is correct. The law requires that a bell shall be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street, or that a steam whistle shall be sounded in like manner; and it is further provided that the corporation shall be liable for all damages which shall be sustained by any person by reason of a neglect to perform this duty. The law requires that the bell shall be rung or the whistle sounded, in order to the protection of persons who are traveling along, or passing over the railroad upon the highway, and for the protection of teams and other stock passing along the highway as well as for the protection of passengers who might be injured by collision, which might otherwise take place at these public crossings. It is presumed that by the timely warning provided, persons and stock passing on the highway will escape from the railroad and prevent a collision and the consequent damages resulting therefrom. In the case of persons passing on the highway, it is easy to see how the warning to be given would prevent any injury, and the same result would follow to a great extent by the warning given by the bell to horses or other stock. It is not unlawful in this State to permit horses to run at large on the commons. And railroad companies are made liable for injuries to persons or property when willfully done or resulting from gross neglect of duty. In order to free themselves from liability, the company in a case where any injury has been inflicted must show that it has discharged every duty imposed by law. An omission to perform a duty imposed by law will create a liability unless it is shown that the injured party has in some way contributed to the injury, or unless the circumstances rebut the presumption that the injury resulted from the neglect of duty on the part of the company. (Great

West. R. R. Co. vs. Geddes, 33 Ill., 304; Aubuchon vs. St. L. & I. M. R. R. Co., 52 Mo., 522. Fickle; vs. The St. L., K. C. & N. R. R. Co., *ante* p. 219.)

A different rule is established, or seems to be established in Indiana, (27 Ind., 96). The learned judge delivering the opinion of the court in that case, assumes that the railroad company was in the lawful use of its own property, and the injury was not the natural result of its act, and therefore the company was not liable. The learned judge seems to forget that he is assuming an act to be lawful which is positively prohibited by the statute.

If it was in fact lawful to approach a public crossing with a train of cars at full speed without ringing the bell, the conclusion arrived at would be correct; but it is the unlawfulness of the act that creates the liability.

The first three instructions given by the court on the part of the defendant, were more favorable to the defendant than in strictness he was entitled to. Under the facts of the case there is no evidence to show that the horses were killed within the limits of a city or an incorporated town, or that the town was an incorporated town at which the accident occurred; nor was it material in this case whether the road was fenced or unfenced, but as the declarations of law were favorable to the defendant, he has no right to complain.

The other objection made by the defendant to the judgment rendered by the court below, has more force. There is nothing in the sections of the statutes under which this action was brought, to authorize the court to render a judgment for double the amount of the damages found; and without some special provision to the contrary, single damages only can be recovered. Therefore for the reason that the court improperly rendered judgment for double damages, the judgment must be reversed, and judgment will be rendered in this court for the sum of one hundred and fifty dollars, the sum admitted by the parties to be the reasonable value of the horses killed and injured.

The plaintiff below is to be taxed with the costs incurred since the judgment below. The other judges concur.

THOMAS HOLLAND, Respondent, *vs.* THOMAS ADAIR AND M. W. JOHNSON, Appellants.

1. *Ejectment—Chain of title—Common source—Prima facie case.*—When both parties to a suit in ejectment claim title through a common source, plaintiff will make a *prima facie* case without tracing his title further.
2. *Sheriff's sale—Purchase at by plaintiff in execution—Irregularities in judgment, etc.*—Plaintiff in an execution issued on an irregular judgment, who purchases at the sheriff's sale, will hold the title, subject to divestiture by an after reversal of the judgment.
3. *Attachment—Notice by publication—Failure of to name amount of damages—Judgment—Title of purchaser how affected, etc.*—The omission in a notice by publication, issued in an attachment, to state the amount of damages claimed, does not render the subsequent proceedings and judgment void, so that the title of a purchaser at special execution sale made thereunder may be attacked collaterally.
4. *Attachment—Publication—Amended petition—Sum originally prayed for—Judgment for, proper, when.*—Defendant in an attachment was brought in by publication, and a subsequent amended petition asked for judgment in excess of that originally prayed for, but the judgment was given for the amount originally claimed. The judgment was held proper within the meaning of the statute. (Wagn. Stat., 1054 § 12; Janney vs. Spedden, 38 Mo., 395.)

Appeal from Hickory Circuit Court.

J. S. Phelps & C. B. McAfee, for Appellants.

I. The effect of a sale under an irregular judgment, whether made to a party plaintiff or some third person, is the same, and the validity of such judgment cannot be attacked in a collateral proceeding. (See Groner vs. Smith, 49 Mo., 318.)

F. P. Wright & W. P. Johnson, for Respondent.

I. The law is well settled, that where both parties claim under the same third person it is *prima facie* sufficient to prove the derivation of title from him without proving his title; defendants do not claim title paramount to Henry W. Holland, but claim his and only his title. (2 Greenl. Ev., 3, 307; Hightower vs. Williams, 38 Ga., 567; Brown vs. Brown, 45 Mo., 414.)

II. The judgment in the Pettis Circuit Court under which defendants claim is null and void. It was rendered on the amended petition which did away with the original petition

under which the publication was made, and was entirely different and claimed a vastly greater sum. (See Janney vs. Spedden, 38 Mo., 395.)

III. The judgment is also void for want of a sufficient notice. The publication was made in 1864 under the statute of 1855, page 246, § 23, "which requires the order of publication to be made stating the nature and amount of the plaintiff's demand or damages claimed, and the publication does not state any amount whatever. Though the levy of the attachment may give the court jurisdiction over the property attached for certain purposes, yet the court could not condemn the land for sale without notice to the person, as a judgment rendered against a person without notice is entirely void. (Durossett's Admr. vs. Hall, 38 Mo., 246; Smith vs. Ross, 7 Mo., 463.)

Vories, Judge, delivered the opinion of the court.

This was an action of ejectment, brought in the Hickory Circuit Court on the 5th day of February, 1870, by respondent against the appellants, to recover certain lands in the petition described. The petition was in the usual form. The defendants in their answer simply denied the allegations of the petition. The cause was tried by the court, a jury having been waived by the parties. It was admitted on the hearing that the defendants were in possession of the lands sued for. At the trial the plaintiff read in evidence a deed dated the 17th of April, 1866, from Henry W. Holland, to himself, for the lands in controversy. He then read in evidence a patent from the United States, conveying a part of the lands sued for to Henry W. Holland, and also other deeds to other parts of the land, by which he attempted to derive title from the United States to Henry W. Holland; but in this he failed as to a small part of the land. It was also shown by the evidence of the plaintiff, that there was a small improvement with a log house on part of the land, and that several years since, Henry W. Holland was residing on the land, and that the monthly rents were worth from two to three dollars. The defendants on their part read in evidence a deed from John

W. Quigg, as sheriff of Hickory county, to defendant Johnson, for the land in controversy. This deed recites that on the 22nd day of July 1864, a writ of attachment was issued from the Hickory Circuit Court in favor of Edward B. Torbert, William D. Murphy, Joseph W. McClurg and Marshall W. Johnson, against Henry W. Holland and Alexander Foster; which writ was delivered to the sheriff of said county and by him, on the 3rd day of August, 1864, levied on all the right, title, interest and estate of the said Henry W. Holland in or to the land in controversy; that on the 31st day of July a judgment was rendered in the Circuit Court of Pettis county, in favor of said Edward B. Torbert, William Murphy, Joseph W. McClurg and Marshall W. Johnson, against the said Henry W. Holland, Alexander Foster, William F. Hicks and Benjamin H. Massey for the sum of thirty thousand dollars and costs, and said lands ordered to be sold to satisfy the same; that on the 22nd day of January, 1868, a special execution was issued on said judgment by the clerk of the Petti- Circuit Court, against the said Henry W. Holland, Alexander Foster, William F. Hicks and Benjamin H. Massey in favor of said plaintiffs; that said execution was delivered to the sheriff of Hickory county, who proceeded to levy and sell the land in controversy, in other respects substantially in conformity with the statutes; and that the lands were purchased at said sale by defendant Johnson, and were conveyed to him by said sheriff, &c., in the usual way. This deed was all of the evidence offered by the defendants.

The plaintiffs then, to destroy the efficacy of the deed read by defendants, offered and read in evidence the entire transcript of the proceedings, and judgment, and execution in the cause commenced in the Hickory Circuit court, of Torbert vs. Charles A. Pippin, Benjamin H. Massey, Alexander Foster, Henry W. Holland and a number of other persons. The transcript being admitted by the defendants to be a transcript of the same cause and judgment upon which the special execution was issued, under which defendant Johnson purchased the land in controversy from the sheriff. From this

transcript it appears that the plaintiffs filed in the office of the clerk of the Hickory Circuit Court, on the 21st day of July, 1864, a petition in which they charge that the defendants wrongfully and wilfully,without leave, at the county of Camdem, took and carried away a large amount of goods of plaintiff's, consisting of boots, shoes, hats, blankets and other dry goods and groceries named in the petition (an account of which was filed,) of the value of thirty thousand dollars, for which judgment was prayed. An affidavit was filed with the petition for an attachment setting forth that the value of the goods was thirty thousand dollars, and that defendants Holland and Foster had so abandoned or absented themselves from their usual places of abode, that the usual process of the law could not be served on them. The affidavit and bond for attachment were in the usual form. On the 22nd of July, 1864, an attachment was issued in the cause against the property of Holland and Foster or so much as would satisfy the sum of thirty thousand dollars. The writ contained a clause of summons against the other defendants. It is shown by the return on the attachment, that defendants Holland and Foster were not found, but that the land in controversy was attached as the property of Henry W. Holland; a number of the other defendants were personally served or summoned, and afterwards appeared and filed their answers to the petition. At the September term for 1864 of the Hickory Circuit Court, an order of publication was made against defendants, Holland and Foster. In this order it is stated that defendants Holland and Foster, cannot be summoned. It is therefore ordered that a publication be made notifying them "that an action has been commenced against them by petition and attachment in the Circuit Court of Hickory county, founded on an account for damages, for an unlawful taking and detention of goods and merchandize; that their property has been attached, and that unless they be, and appear, &c., judgment will be rendered against them and their property sold to satisfy the same." It was further ordered, that the publication be made in the State *Times* at Jefferson City.

At the September term of the Hickory Circuit Court for the year 1865, part of the defendants who had appeared and answered, filed a motion praying the court to change the venue in the case to some other county for reasons stated. This motion was sustained and the cause sent for trial to Pettis county. After the cause was transferred to Pettis county at the November term of the Pettis Circuit Court, in the year 1865 the plaintiff Murphy, having before this time died, the remaining plaintiffs as surviving partners obtained leave to file an amended petition in vacation, and the cause was continued. The amended petition was filed on the 6th day of June, 1866, by which it was charged "that defendants during the months of August, September and October, in the year 1861, at Linn Creek, Camden county, Missouri, unlawfully without leave, wrongfully, willfully and maliciously took and carried away, and converted to their own use from the store and premises of the plaintiffs at said county of Camden, goods, wares and merchandize belonging to, and in the possession of, the plaintiffs, of the value of one hundred and thirty-five thousand dollars," (the items of all which were filed with the petition). The petition further charges, "that the injury complained of was willfully and maliciously done by defendants; by reason of which, plaintiffs are entitled to exemplary damages." Judgment was prayed for two hundred thousand dollars. With this amended petition was filed a sworn bill of particulars amounting to one hundred and thirty-five thousand dollars. The only notice ever given of the filing of this amended petition in vacation, was, that a copy of the petition with the notice following was fastened to the door of the office of the clerk of the Pettis Circuit Court on the 13th day of December, 1866:

"To Benjamin H. Massey and Henry W. Holland: You are hereby notified that an amended petition, of which the above is a copy, has been filed in the above named cause."

After this notice, and after the suit had been dismissed as to all of the defendants who had been served with a summons, and had appeared, on the 31st day of July 1867, the

cause being called for trial, proof of publication was made as to the defendants Holland and Foster, and a judgment by default was taken as to them and judgment by default was taken as to defendants Hicks and Massey; the court proceeded to assess the damages and after having heard the evidence assessed the damages at the sum of thirty thousand dollars, and rendered a judgment against defendants for said amount with costs. It was further ordered that a special execution issue against the land attached as the property of said Holland, and now in controversy, and that a general execution issue against the defendants, Foster, Hicks and Massey.

It also appears from the evidence, that defendant Foster died on the 4th day of July, 1863; that defendant Massey died during the pendency of the suit.

This being all of the material evidence in the cause, the court at the request of the plaintiff declared the law as follows:

1st. As both pltff. and defendant claim title from and through Henry W. Holland, it was sufficient for plaintiff to show a derivative title from him, without proving his title further back.

2nd. The deed read in evidence by plaintiff from Henry W. Holland and wife, dated the 17th day of April, 1866, was sufficient to convey to plaintiff all the estate of Henry W. Holland at the time, only subject to the attachment lien of plaintiff in the cause of Joseph W. McClurg, Edward B. Torbert and Marshall W. Johnson, *vs.* Charles A. Pippin, Benjamin H. Massey, Henry W. Holland and others, if any such lien then existed, and such attachment lien would be of no avail to defeat plaintiff's title, unless the same has ripened into a valid judgment against said Henry W. Holland.

3rd. The said Marshall W. Johnson, one of the defendants in this cause, being the grantee in the deed, read in evidence by defendants to rebut plaintiff's title and being one of the plaintiffs in the attachment suit upon which defendants found their said deed, and a party to said record, does not stand in the position of an innocent purchaser, but being privy to, and cognizant of any irregularities in the proceedings, holds his deed subject to such irregularities if any exist.

4th. The publication in the case notifying the said Henry W. Holland and Alexander Foster, "that an action has been commenced against them by petition and attachment in the Circuit Court of Hickory county, founded on an account for damages, for unlawful taking and detention of goods and merchandize, and that their property has been attached," is not a sufficient compliance with the statute requiring a publication to be made stating the nature and amount of plaintiff's demand or damages claimed; and judgment rendered on such constructive notice alone against the said Henry W. Holland after his sale of said land to Thomas Holland, and a subsequent sale of said lands under a special execution issued thereon, and a deed by the sheriff to said Marshall W. Johnson, a party to said judgment, would not be sufficient to defeat plaintiff's title so acquired from said Henry W. Holland and wife.

5th. The judgment in the Pettis Circuit Court was rendered on the amended petition there filed, and not on the original petition filed in said cause in this court; and the said publication was not sufficient to notify the said Henry W. Holland of the nature and amount of said amended petition, or the nature or amount thereof, although the same may have been posted up in the clerk's office. And the said Marshall W. Johnson did not by a purchase of the land under said judgment, and an execution issued thereon, acquire such title or interest in said lands as will defeat plaintiff's title acquired by his deed from Henry W. Holland and wife.

The defendants objected to these declarations of law and their objections being overruled they excepted. The court then refused the following declarations of law asked for by the defendants and they again excepted. 1st. "That the plaintiff in this suit can recover only on the strength of his title and has shown by the evidence he has introduced that the title to the North-east quarter of the South-east quarter of section ten was in one, Henderson." 2nd. "That the title to the south-west quarter of section fifteen was in Owens; and that

the title to the north-east quarter of the south-east quarter of section sixteen, was in the State for the benefit of schools, and that he has shown no legal title to said lands in Henry W. Holland, plaintiff's grantee, nor in plaintiff." 3rd. "That though the judgment of Torbert & Co. against Henry W. Holland, may be irregular and voidable, yet said judgment is not void." 4th. "That the effect of the deed of the sheriff of Hickory county, to Marshall W. Johnson, is to transfer to the said Johnson, all the right, title and interest in and to the lands named therein which the plaintiff has shown, H. W. Holland, his grantor, had at the date of the levy of the attachment named in said deed." 5th. "That the effect of a sale of land under an irregular but not void judgment, is the same whether made to a party plaintiff in whose favor such judgment was rendered, or to some third person." There were other declarations of law given by the court on the part of the defendant, which need not be repeated here.

Judgment was rendered by the court in favor of the plaintiff for the possession of the lands with nominal damages. A motion was filed by the defendants for a new trial, which being overruled, defendants again excepted and bring the case here to be reviewed.

Both parties claim title to the land in controversy through Henry W. Holland. The plaintiff, by deed directly from Holland and wife, and the defendants by virtue of a sheriff's deed which is founded upon an atttachment, judgment and an execution, under which the land was sold by the sheriff of Hickory county, to defendant Johnson; the levy of the attachment being prior in date to plaintiff's deed. In such case it was only requisite for the plaintiff in order to make a *prima facie* case, to deduce his title from Henry W. Holland the common scource of title. And it makes no difference that he has unnecessarily attempted to prove the title to have existed in the one, who is the common source of title, and failed so to do. The defendant necessarily admits the title of the one under whom he claims, the only question being, whether the plaintiff or defendant have the better title derived from the

one under whom they both claim. (Brown vs. Brown, 45 Mo., 412; Fowler vs. Wise, 49 Mo. 350.) It follows, that the first declaration of law made by the court at the request of the plaintiff was properly made, and the first declaration of law asked by the defendant, properly refused.

It is insisted by the defendant that the court erred in its third declaration of law given at the request of the plaintiff. By that declaration of law, the court declares the law to be, that Marshall W. Johnson having become the purchaser of the land in controversy under an execution in which he was one of the plaintiffs, is not to be considered an innocent purchaser, but holds his deed from the sheriff subject to any irregularities which may exist in the judgment or proceedings under which the execution issued and the sale took place. In one sense this instruction may be correct, but as applicable to the case under consideration it is not. If a plaintiff in an execution issued on an irregular judgment becomes the purchaser at sheriff's sale, made under the execution, he will hold the property subject to have his title defeated by an after reversal of the judgment. When the judgment is reversed his title ceases, and he must restore the property still remaining in his hands; but the title is good until the judgment is reversed. If the property however is purchased by a stranger, the title of the stranger will remain good in a general way, even after the judgment shall be reversed. (Gott vs. Powell, 41 Mo., 416, and cases there cited.) It is not pretended that the judgment under which Johnson purchased has ever been reversed, so that it will be seen that the declaration of law was erroneous as applicable to this case.

It is next objected by the defendants that the court erred in making its fourth declaration of law on the part of the plaintiff. By that declaration of law it is asserted that if the publication made in the attachment suit against Henry W. Holland and others, omitted to state the amount of damages claimed, although the notice was regular in every other respect, and had been regularly published, a judgment rendered under such constructive notice and a subsequent sale of the

land under a special execution issued thereon, to defendant Johnson, and sheriff's deed thereunder, would not be sufficient to vest the title in Johnson, against a purchaser from the defendant in the attachment subsequent to the levy of the attachment. There was no question made in this case as to the regularity of the commencement of the suit against Henry W. Holland, *et al.* The petition was regularly filed, the affidavit for the attachment was regular and sufficient, the writ of attachment was sufficient and regularly issued, the levy on the land is unquestioned and publication regularly ordered by the court, and regularly published; but the simple question growing out of the declaration of law under consideration, is, whether the omission in the publication to state the amount of the damages claimed, would render the after proceedings and judgment of a court so void that a sale under a special execution issued on said judgment would confer no title, and could be attacked in a collateral proceeding and be held void. That this defect in the notice is an irregularity, is admitted, but the court having acquired jurisdiction of the cause, and of the property attached, and having in its judgment found that publication had been duly made, the judgment is not void and cannot be attacked in a collateral proceeding. It follows that the said declaration of law was erroneously made. The question involved in the declaration of law last referred to, has been fully discussed and decided in several recent decisions made by this court, and need not be further discussed here. (Hardin vs. Lee. 51 Mo., 241; Freeman vs. Thompson, 53 Mo., 183; Kane vs. McCown, *et al.* decided at the present term of this court.)

It appears from the record in this case, that after the publication had been made in the case of McClurg and others against Henry W. Holland, *et al.*, the plaintiffs in that suit filed an amended petition, in which they declared for the taking of the same goods named in the original petition, but stated the value of the goods to be much greater than was stated in the original petition, and also stated that the goods were forcibly and maliciously taken; wherefore the plaintiffs claimed

vindictive damages, and prayed judgment, not for the sum of thirty thousand dollars, as was claimed in the original petition, but for the sum of over two hundred thousand dollars. It is claimed by the plaintiff in this action, that the judgment was rendered on this amended petition of which the defendants had no notice, and that it is therefore void; and that the sheriff's sale and deed made under and by virtue of a special execution issued upon the judgment, conferred no title on Thompson, who was one of the plaintiffs in said judgment. The fifth declaration of law made by the court is to that effect. In the case of Janney vs. Spedden, 38 Mo., 395, a suit was brought to enforce a vendor's lien on certain land named in the petition, and to subject the land to the payment of the demand named in the petition. One of the defendants being a non-resident, publication was made as to such defendant, after which a personal judgment was taken against said defendant without any reference to the property proceeded against in the original petition. This personal judgment was held to be void. This decision was evidently correct. The mere dismissal of the petition as to the land could give the court no jurisdiction in that case to render a personal judgment. Our statute provides that in cases where notice is given by publication "the damages or other relief shall not be other or greater than that which he shall have demanded in the petition as originally filed and served on the defendant." The judgment in this case seems to have been rendered with reference to the provisions of the statute. The original petition claimed damages in the sum of thirty thousand dollars. The judgment was rendered for that exact amount and was not different, or other than that demanded in the original petition. There were several other points made in this case, but they all refer to mere irregularities in the proceedings, which cannot be inquired into in a collateral way, and need not be further noticed here.

The judgment is reversed and the cause remanded. Judge Sherwood did not sit. The other judges concur.

STATE OF MISSOURI, Defendant in Error, *vs.* J. B. MACKEY AND N. P. THOMPSON, Plaintiffs in Error.

1. *Scire facias bond—Appearance—Forfeiture at term subsequent to, etc.*—Where pursuant to the terms of his recognizance a prisoner presented himself at the term of court therein named and remained in court during the term ready to obey its orders, and no measures were taken to commit him or otherwise secure his appearance at any subsequent term, on adjournment the bond would be discharged, and could not be forfeited by the failure of the prisoner to present himself at a subsequent term.

Error to Cass Circuit Court.

Wm. M. Stearns, for Plaintiffs in Error.

I. When a defendant is recognized in a criminal case to appear at a subsequent term of the court, that the obligation continues until the record is made discharging him from such recognizance. (State vs. Randolph, 22 Mo., 474.)

H. Clay Ewing, Att'y Gen'l, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This was a proceeding by *scire facias* upon a forfeited recognizance. The facts were as follows:

At the March term of the Circuit Court for Cass county an indictment was found by the Grand Jury of said county against the defendant Mackey, for unlawfully selling spiritous and alcoholic liquor, without having subscribed or filed an oath not to adulterate the same, or made or filed the bond according to law in such cases made and provided. A *capias* was afterwards issued on said indictment, by virtue of which the sheriff of said county arrested Mackey, who in order to procure his discharge from said arrest, together with defendant Thompson, executed and delivered to said sheriff the following recognizance or bond.

"Know all men by these presents that we, J. B. Mackey, as principal, and N. A. Thompson, as security, are held and firmly bound unto the State of Missouri in the sum of two hundred dollars, for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, administrators and ex-

ecutors firmly by these presents, signed with our names, and sealed with our seals, and dated this 15th day of April, 1868. The condition of the above bond is such that, if the above bounden J. B. Mackey shall make his personal appearance before the Judge of the Circuit Court, within and for the county of Cass, in the State of Missouri, at the court house in the city of Harrisonville, on the first day of the next term of the Circuit Court, to be begun and held at the court house in the city of Harrisonville, on the third Monday after the second Monday in September next, to answer unto the State aforesaid, for indictment now pending against him in our said court—the one for selling liquor without filing oath and bonds—and not depart from said court without leave thereof; then this bond to become null and void, otherwise to remain in full force in law. Given under our hands this day and date above written."

This bond was signed and sealed by the parties and returned into the clerk's office of Cass county as the law directs This is the last that is heard or known of the bond, or case, so far as appears by the record, until the 5th day of the October term of said Circuit Court, for the year 1869, at which term the following entry appears of record:

"State of Missouri, Plaintiff, against J. M, Mackey, Defendant, for selling liquor without filing oath and bond.

"Now at this day comes the State who prosecutes in this behalf, by her Circuit Attorney, and on motion of said plaintiff by her said Circuit Attorney, this cause is continued at the cost of said plaintiff."

The next entry appearing in the cause is made on the 8th day of April at the April term of said court for the year 1870, at which time it appears that the Circuit Attorney appeared on the part of the State; had the defendant Mackey, called and also the defendant Thompson called as the surety of Mackey, neither of them made any appearance. The bond or recognizance was then forfeited; *scire facias* ordered against the defendants returnable to the next term of the court. The *scire facias* was issued on the 25th day of

May, 1870, returnable to the October term of said court for the year 1870. The *scire facias* recited the finding of the indictment at the April term of the court for the year 1868; the issuing of a *capias* on said indictment, on the 9th day of April, 1868; the arrest of defendant Mackey, by virtue of said writ, on the 15th day of April 1868; the making of the bond or recognizance by defendants on the last named day, and the conditions thereof; that defendant Mackey at said October term of said court, although appearing, did depart said court without leave thereof, whereby his said recognizance bond was forfeited to the State of Missouri. The sheriff was therefore commanded to summon the defendants to be and appear at the October term of the court to show cause, &c. At the October term of the court for the year 1870, the defendants appeared to the *scire facias* and obtained leave of the court to file an answer thereto in vacation; and it appears, that they filed their answer on the 18th day of January 1871. The defendants in their answer deny that the defendant Mackey, departed said court without leave thereof, whereby said recognizance bond was forfeited to the State of Missouri, and a forfeiture taken by said State; they deny that there was any forfeiture of said bond, or that a lawful forfeiture thereof was taken by said State.

And defendants then averred that said Mackey appeared at said October term for the year 1868, as required by the conditions of said recognizance bond, that he remained in attendance on said court at its said term until the adjournment thereof; that said cause was continued at said term by the State of Missouri, and that no forfeiture of said recognizance bond was taken at said October term, 1868, nor was any lawful forfeiture thereof ever taken at any time. Wherefore judgment is prayed.

No replication was ever filed to this answer, but at the October term, 1871, the only entry made in the cause after the filing of the answer, reads as follows:

"Now at this day comes, the State aforesaid by her Circuit Attorney, and on his motion this cause is taken up and sub-

mitted to the court for trial, whereupon the court doth find that heretofore, to-wit: On the 15th day of April A. D., 1868, said defendants entered into a recognizance bond unto the State of Missouri, in the sum of two hundred dollars each, conditioned that the above named defendant, J. M. Mackey, should make his personal appearance, at the next following term of the court, then and there to answer unto the State of Missouri, on an indictment for selling liquor without filing oath and bond. The court further finds that at the April term A. D., 1870, said surety failed to produce the body of said defendant into court whereby said recognizance bond was forfeited to the State aforesaid, and a forfeiture thereof taken at said term. Whereupon the court doth find that said defendants J. M. Mackey and N. A. Thompson, are indebted to the State of Missouri in the sum of two hundred dollars, and that the same is entitled to bear interest at the rate of six per cent. per annum. It is therefore considered by the court here, that said plaintiff recover against the said defendants J. M. Mackey and N. A. Thompson, the said sum of two hundred dollars so forfeited to the State as aforesaid, together with her costs and charges in this behalf expended and that she have thereof execution, interest 6 per cent."

The defendants on the same day of the rendition of the judgment, filed their motion for a new trial, and assigned as reasons therefor that the verdict of the court is against the law of the case, and that the court erred in finding for the plaintiff.

The court overruled this motion and the defendants at the time duly saved their exceptions and have brought the case to this court by writ of error.

No evidence is preserved in this case by the bill of exceptions, nor in fact does it appear that any was given or offered at the hearing. It would seem from the whole record that the case was submitted to the court and tried upon the record appearing in the case. The court made a special finding of facts in the case and rendered judgment upon the facts found, and the facts found by the court correspond with the previous

record in the case. The question presented for the consideration of this court, is, did the facts found by the court authorize the judgment rendered by the court? For I take it to be correct to say, that where a special finding of facts are made, and judgment rendered thereon, it at least is equivalent to a declaration of law on the part of the court that the facts found are sufficient in law to authorize the judgment rendered. The finding of the court in this case is, that the defendants had bound themselves by their bond or recognizance, (which was dated on the 15th day of April 1868,) that the defendant Mackey should appear at the next following term of the court. (The next term of the court being holden by law in October 1868.) The court further finds that at the April term 1870, said surety failing to produce the body of said defendant in court, whereby the said recognizance and bond was forfeited to the State, and forfeiture thereof taken at said term, the court therefore finds that the defendants are indebted to the State and that an action hath accrued, &c., and proceeds to render judgment. The record in the cause shows the same state of facts found by the court. It appears from the record that at the October term of said court for the year 1869, the only entry in the cause before the judgment was that the cause was continued at the motion of the State, and at the April term of the court of the year 1870, the parties were called and required to appear and the bond was forfeited. The terms of the bond or recognizance are, that Mackey should appear at the October term of the court for the year 1868, and not at the April term of the court in the year 1870.

If the defendants appeared at the October term in the year 1868, as required by the bond, and remained in court the whole term, ready to obey the order of the court until the term was adjourned, and no measures were taken by the court to commit the defendant or otherwise secure his appearance at any subsequent term of the court, upon the adjournment of that term of the court, the bond or recognizance would become discharged and of no further effect and could

not be forfeited by the failure of the defendant to appear at some subsequent term of the court. (Smith vs. The People, &c., 1 Park. Crim. 317; Keefhaver vs. Commonwealth, 2 Penn., Penrose, R. 240; Kiser vs. The State, 13 Ind., 80.) The same doctrine is recognized in Swank vs. The State of Ohio, 3 Ohio State R., 429. It follows that from the special facts found by the Circuit Court and which are sustained by the other parts of the record, the plaintiff had shown no right to recover.

The judgment will therefore be reversed. The other judges concur.

ROBY S. PORTER, JR., Trustee, etc., Plaintiff in Error, *vs.* JESSE SCHOFIELD, *et al.*, Defendants in Error.

1. *Deeds of trust—Implied power in trustee to sell, for debts of cestui que trust.*—A deed of trust, which binds the property conveyed for the payment of the beneficiary's debts, without express words, vests in the trustee an implied power to sell for that purpose.
2. *Deed of trust—Sale under—Trustee—Description of in deed.*—A trustee's deed, which describes him as trustee, and is signed by him with the word "trustee" added to his name, and describes the land conveyed by him as part of the lands deeded to him by the deed of trust, contains a sufficient reference to the source of his power to validate his sale and deed.

Error to Lafayette Circuit Court.

Rathbun & Graves, for Plaintiff in Error.

I. The deed from Thomas J. Porter, as trustee, to defendants Hughes and Wasson, was void upon its face. Kent. Com. v. 4, p. 333, § 4, establishes the doctrine, "that when the consent of a third person to the execution of a power is requisite, the consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon, and the instrument or certificate shall be duly proved or acknowledged." (Barbour vs. Carey, 1 Kern., p. 397.) In case at bar, the power of trustee

Porter, to convey, emanated from his grantor, and requires the request in writing of the beneficiary, which is an essential condition. No such consent having been obtained or given, the sale and deed to Hughes and Wasson, are void both at law and in equity. (Thornburg vs. Jones, 36 Mo., 574; Powers vs. Kueckhoff, 41 Mo.,425; Jackson vs. Clark, 7 Johns., 217; Miller vs. Hull, 4 Denio, 104; King vs. Duntz, 11 Barb. 192; Sherwood vs. Reed, 7 Hill, 431.) Equity will not aid defects which are of the very essence of the power, as in this case, "if the power be executed without the consent of parties who are required to consent to it." (1 Sto. Eq Juris. [8th Ed.], p. 97, § 97; Janney vs. Spedden, 38 Mo., 395.)

Doniphan & Gaines, and Dunn, for Defendants in Error.

I. In this deed the grantor describes himself, thus, "I Thomas J. Porter, Trustee," and refers to the subject of the power, as follows: "A part of certain lands, heretofore conveyed by one Levi Vancamp, to the said Thomas J. Porter, in trust for certain purposes, in said deed of trust mentioned, and which said deed of trust is dated March 23rd, A. D. 1865, and is recorded in the Recorder's office for said Lafayette county, in Deed Book N. No. 1; at pages 398–399," referring directly to the subject of the power, and showing that the said Thomas J. Porter, had in view the subject of the power, in the execution of said deed of conveyance; and he executes said deed in the name of "Thomas J. Porter, Trustee." (Hazel vs. Hagan, 47 Mo., 277, 281–282; 2 Sto. Eq. Juris., 1062, note 3, and cases cited; Collier Will Case, 40 Mo., 329–330; 4 Kent. Comm., [6th Ed.] 334–336.)

II. The deed from Levi Vancamp to Thomas J. Porter invested the latter, as such trustee, with full power and authority to sell and convey the real estate, whenever desired to do so by the said Elvira Porter. If such request was given, and said sale assented to by said Elvira Porter, or after said sale was acquiesced in by the said Elvira Porter, such acquiescence was a ratification of said sale, and said trustee is estopped from claiming said land. (Wendell vs. Van Rensalaer, 1 Johns. Ch.,

352; Starrs vs. Barber, 6 Johns. Ch., 167, 172; 1 Sto. Eq., [4th Ed.] §§ 385, 388; Heuntson vs. Clark, 13 Mo., 388-390; Taylor vs. Zepp, 14 Mo., 482; 2 Washb. Real Prop., [2nd Ed.] 452; Welland Canal vs. Hathaway, 8 Wend., 480; Corning vs. Gould, 16 Wend., 545; Hughby vs. Barrow, 49 Mo., 103; *Ibid*, p. 231, 48 Mo., 325.)

H. C. Wallace, for Defendants in Error.

I. By the terms of the deed, the trustee was to collect and receive the rents and profits of the lands therein mentioned, out of which after paying taxes and expenses of repairs, to pay off said mortgages. These mortgage debts are by said deed, made a charge on the whole of the lands on both sides of the road, and this charge constituted a trust to sell said lands, to pay said debts, if they could not in a reasonable time, be paid out of the rents and profits. If the trusts of the deed require a gross sum to be raised, the expression "rents and profits," will not confine the power to the mere rents; and the trustee may sell. The rents and profits are but the means, which are not to control, but to yield to the end to be accomplished. (2 Sto. Eq. Juris., [4 Ed.] §§ 1064–1064*a*-1064*b*, and notes 2–3, and cases cited; Ball vs. Harris, 4 Myln & Craig, 264, and cases cited; Hazel vs. Hagan, 47 Mo., 277; Green vs. Belchier, 1 Atk., 505; Shrewsbury vs. Shrewsbury, 1 Ves. Jr., 233; Allen vs. Backhouse, 2 Ves. & Beame, 64-76.)

II. The deed made by Thomas J. Porter, to Hughes and Wasson, for the land in controversy, sufficiently shows on its face, that it was made in execution of the power conferred on him, as trustee, by the deed of Levi Vancamp, aforesaid. The deed not only purports to be made by Thomas J. Porter, as "trustee" but the subject matter of the trust, the land conveyed, sufficiently shows the intention to execute the trust. (Hazel vs. Hagan, 47 Mo., 277, 281-2; 2 Sto. Eq. Juris., § 1062*a*, and note 3, and cases cited; Collier Will Case, 40 Mo., 287, at pp. 329-330; 4 Kent's Comm., [6th Ed.] 334, 335, 336.)

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for land in Lafayette County.

Both parties claim, under Levi Vancamp and under a deed of trust executed by him to Thomas J. Porter, as trustee, first, for payment of certain debts and then in trust for Elvira Porter, wife of John S. Porter, for her life, and, at her death, for her children.

The trusts of this deed are declared in the following language: "To have and to hold the real estate unto the party of the second part, Thomas J. Porter, his heirs and assigns forever; in trust, however, for the following uses and purposes: First, to receive and collect the rents, issues and profits of said property hereby conveyed, and, after paying taxes and necessary expenses of repairing the same, to pay the mortgage and judgments now on the same to Lafayette County, for the use and benefit of common schools, the amount to said county being originally five hundred dollars, borrowed by John S. Porter, who executed a mortgage on part of the above lands to said county of Lafayette; and the said Levi Vancamp was security for him to said county on a promissory note for that sum; and shall also pay the balance of another mortgage on part of said lands, originally executed to Levi Vancamp, the grantor herein, by the said John S. Porter, to secure to said Levi Vancamp, as executor of William S. Vancamp, deceased, the sum of thirty-six hundred and ninety-eight dollars and thirty-four cents, and which said debt and mortgage was assigned by said Vancamp to his daughter, America Nichols, widow of James Nichols, deceased, on which said last mentioned mortgage, there is now due about the sum of nine hundred and forty dollars, principal and interest, and after payment of these two debts, as above mentioned, to pay over all the net profits, rents, issues, etc., to the said Elvira Porter, party of the third part, for and during her natural life and upon her receipt alone and without any control or interference of her husband, John S. Porter, and it is the express understanding and agreement that if the said Elvira Porter desires to sell and convey said real estate, then the said Thomas J. Porter has full power

and authority to sell and convey the same or any part thereof, and shall re-invest the proceeds of such sales in other trust property for the use, benefit and interest of the said Elvira Porter herself, without any control of her said husband; secondly, from and after the death of the said Elvira Porter, then the said trustee shall hold whatever real estate he may possess under this deed at that event, to and for the use and benefit of such children of said Elvira as shall be then living and to her grandchild or children of any such of her children as shall be dead, such grandchild or grandchildren to have only such share as their deceased father or mother would have if living.

* * * * * * * * * * *

"The receipt to him of *the* Elvira shall be a sufficient discharge of all liability, so far as it goes, under this deed of trust. He shall pay to her all profits after the mortgages are paid off, and her written request to said trustee to sell shall be his sufficient authority to do so. Upon the death of said Elvira, her children shall then, as stated above, with any grandchildren, if there be any such, inherit the said trust fund."

The trustee, Thomas J. Porter, sold and conveyed part of the trust land, being the part for which this suit was brought, to Joseph Hughes and George S. Wasson, for $7,000, on the 21st day of March, 1867, and paid off the debts mentioned in the deed of trust, the rents and profits being wholly insufficient for that purpose, and the balance of the purchase money he appropriated to other debts, due by John S. Porter.

In the deed to Hughes and Wasson, he describes himself as trustee and refers to the deed of trust simply by stating that the land conveyed is a part of the same conveyed to him by the said deed of trust, and warrants the title against all persons claiming under himself, and, in signing his name, added the word "trustee."

Hughes and Wasson afterwards, in October, 1867, conveyed the land in dispute to the plaintiff in fee.

Afterwards, Elvira Porter made an *ex parte* application to the Circuit Court of Lafayette County to have another trustee appointed, alleging, that the said Thomas J. Porter had re-

signed, and the court, on this application, appointed the plaintiff, Roby S. Porter, trustee, and as such he brought this suit.

There was evidence given on the trial that the defendant, Schofield, took possession under his purchase and made valuable and lasting improvements to the amount of seven thousand dollars, and that Elvira Porter had knowledge of the improvements, as they were being made, and claimed no title during their progress. There was no evidence that she made any written request for the trustee, Thomas J. Porter, to sell the land in controversy.

The case was submitted to the court for trial, and numerous instructions were passed upon by the court, which, under the view we take, it is unneccessary to recite. The court found and gave judgment for defendant. A motion for a new trial was made by the plaintiff and overruled.

1. The first point raised by this record is whether the trustee, Thomas. J. Porter, had power to make the sale to Wasson and Hughes, for the purpose of paying the debts secured by the trust deed, without the written request of Elvira Porter, the *cestui que trust* for life.

The language of the deed does not, in express words, create the power to sell for the payment of the debts; but it is manifestly implied, from the fact that the debts were charged upon the land, and the trustee was directed to pay them out of the rent and profits. As the rents and profits were wholly insufficient for that purpose, they must be looked upon only as one means of payment and not as the only means. The property itself being bound for the debts, an implied power exists in the trustee to make the sale for that purpose, without resorting to the tedious and expensive process of a suit in chancery.

This is the settled law in regard to powers raised by implication in wills for payment of debts, and I see no reason why the same language in deeds of trust should not receive the same construction. (2 Sto. Eq. §§ 1064, 1064a.)

By the terms of this deed, the written request of Elvira Porter only applies to a sale for the benefit of herself and children, and not for the payment of debts. The deed ex-

pressly declares that when a sale is made on her written request, the proceeds of such sale shall be held and invested for her use and benefit for life, and at her death for her children; and there is no intimation in the deed that the proceeds of such sales are to be appropriated to the debts. The donor seems to contemplate that the rents and profits alone would be sufficient, without a sale, for the payment of the debts, and made no express provision for a sale to pay them; that is an implied and not an express power.

2. The next point is whether the deed by the trustee, Thomas J. Porter, to Wasson and Hughes was properly executed by him in his fiduciary capacity so as to pass the legal and equitable title to them. The deed describes him as trustee and it is signed by him with the word "trustee" added to his name, and in the body of the deed the land is described as part of the lands conveyed to him by the deed of trust.

This was certainly a sufficient reference to the source of his power to make the sale and deed in question.

Whether the trustee could appropriate the proceeds of the sale to other debts than those secured by the trust, need not be discussed here. The grantees were not required to see that the trustee properly performed his duties in this respect. The title passed to them unincumbered by the trust.

The determination of these points necessarily leads to an affirmance and renders it unnecessary to pass upon the question of estoppel and other numerous questions discussed here by the learned counsel on both sides.

Judgment affirmed; the other judges concur.

STATE OF MISSOURI, Defendant in Error, *vs.* CARROLL BRANNON, Plaintiff in Error.

1. *Criminal law—Indictment—Robbery in first degree—Conviction of in second degree—Autrefois acquit.*—One indicted for robbery in the first degree cannot be convicted of robbery in the second degree; and, in such case, a verdict of robbery in the second degree operates as an acquittal of robbery in the first degree.
2. *Criminal law—Robbery in first and second degrees—Grand larceny, etc.*—Where an indictment, charging robbery in the first degree, contains all the descriptive elements of grand larceny, and defendant, under the indictment, might have been convicted of the latter offense, but was in fact found guilty of neither, but only of robbery in the second degree, he cannot afterward be arraigned and tried for either.

Error to Henry Circuit Court.

W. P. Johnson, for Plaintiff in Error.

I. This defendant was indicted for robbery in the first degree, but there was only one count in the indictment and it did not embrace robbery in the second degree. The case was submitted to a jury, and a verdict returned of robbery in the second degree, which is, under the decisions of this court, an acquittal of the offense charged in the indictment, and defendant ought not to have been tried again under the law. (State Const., Art. I, § 19; Bish. Crim. Law [3d Ed.], §§ 858–61, 865–75; 5 Ind., 291; State vs. Ross, 29 Mo., 48; State vs. Ball, 27 Mo., 227; State vs. Kattleman, 35 Mo., 105; 3 Greenl. Ev., § 36.)

II. But it may be said, that, although acquitted of the charge of robbery in the first degree, yet the indictment also embraces grand larceny; but I submit, that the major includes the minor; that when one is charged with the crime of murder in the first degree, and is tried and acquitted by a jury, he cannot be again tried upon the same or another indictment for an inferior degree of homicide; and the same rule holds in a case of robbery in the first degree. If a new indictment were found against this defendant, for the same supposed offense, he could plead his acquittal in bar, and could not be again tried on the same indictment. (3 Greenl. Ev., § 36; 1 Bish. Crim. Law, §§ 87–89; 17 Wend., 386; 26 Penn., [2 Casey] 513.)

Ewing, Att'y Genl., for Defendant in Error.

The indictment in this case is a good grand larceny indictment. (1 Wagn. Stat., 456, § 25.) The defendant was found guilty of grand larceny in this court, and there can be no objection thereto.

At the first trial the defendant was tried and found guilty of robbery in the second degree; and by implication not guilty of robbery in the first degree. And the point is made that the defendant could not afterwards be tried for larceny, when the finding of the jury was dismissed by the court as to the robbery in the second degree. We here insist, in as much as the finding of the jury for robbery in the second degree in the indictment for robbery in the first degree was a nullity, and as no judgment could be rendered thereon, that the case stood as if there had been no trial.

Here the jury found defendant guilty of an offense for which he was not tried, and now must the defendant go discharged? (State vs. Koerner, 51 Mo., 174.) This case is not analogous to one where a party is charged with murder, and the jury finds him guilty of a lesser grade of homicide. In homicides, when for instance, the indictment is for the highest grade—murder—the jury could under a count for murder alone, find the defendant guilty of any grade of homicides below murder. (Plummer vs. State, 6 Mo., 231; Mallison vs. State, 6 Ind., 399; State vs. Watson, 5 Mo., 497; State vs. Ostrander, 30 Mo., 13.) The reason of this is, that homicide is the *genus*, and the various grades thereof, such as murder in the several degrees, manslaughter &c., constitute the species. But this is not true of robbery (in its degrees) and larceny, and hence the doctrine contended for by the defendant's counsel can have no application here.

The case of the State vs. Ross, 29 Mo., cited *contra*, has no application to this kind of offense, because the verdict in this case was a nullity, and was not responsive to the indictment and was wholly unauthorized by law.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for robbery in the first degree. A trial was had and the jury brought in a verdict against him of robbery in the second degree. The jury was then discharged, and the court subsequently, of its own motion, set the verdict aside. The defendant then made his motion to be released from further custody, on the ground that he had been acquitted of the offense charged against him in the indictment. This motion was overruled, and at a succeeding term he was again tried and convicted of larceny. As there were no degrees in the crime charged in the indictment, the first verdict was palpably erroneous and not responsive to any issue presented. But under what may now be considered the well established rule in this State, it operated as an acquittal of the offense of robbery in the first degree, as charged in the indictment, and the only question to be considered is, whether it was competent on the same indictment to arraign and convict the defendant of larceny.

A case very much in point is the State vs. Jenkins (36 Mo., 372), where it was held that a party indicted for robbery in the first degree could not be convicted of robbery in the second degree, and that, in such a case, a verdict of robbery in the second degree amounted to an acquittal of the charge of robbery in the first degree. But it was said that the indictment contained a description of the offense of grand larceny, for which the defendant might be tried. The indictment in this case contains all the descriptive elements necessary to constitute the crime of grand larceny, but as the defendant was not convicted of that offense on the first trial, but of a wholly different one, can he be again arraigned and tried for it now?

Wharton lays it down as a settled principle that an acquittal on an indictment for a greater offense, is a bar to a subsequent indictment for a minor offense, included in the former, wherever, under the indictment for the greater offense, the defendant could have been convicted of the less; and that an acquittal on an indictment for robbery, burglary or larceny, may be pleaded to an indictment for larceny of the same goods, because

upon the former indictment, the defendant might have been convicted of the larceny. (1 Whart. Crim. Law, 6th Ed. 560.)

Bishop says, that, "where several crimes are included one within the other, obviously a conviction for any higher one bars a prosecution for any lower; since the greater includes the less. And, as a general rule, the same consequence follows an acquittal, because generally there can be a conviction for the lower on an indictment for the higher; but, sometimes, owing either to the form of the allegation, or to the lower offense being a misdemeanor, while the higher is a felony, such conviction cannot be had; and then, though the party is acquitted of the higher, he may be indicted for the lower. Thus, a trial and acquittal for a robbery bars an indictment for larceny of the same property; but, where the rules of the English common law prevail, no acquittal for felony can bar a prosecution for misdemeanor." (1 Bish. Crim. Law [3d Ed.], § 887.)

In Heikes vs. The Commonwealth (2 Casey, 514), it is held, that where a defendant has been once tried for an offense upon an indictment, on which he could have been legally convicted and sentenced, the plea of *autrefois acquit*, will avail him on a second indictment for the same offense. And the very question here presented came up in The People vs. McGowan (17 Wend.,386), where it was decided that the indictment, although for a robbery, involved the question of larceny, of which the prisoner, under that indictment, might have been convicted, and, as the prisoner had been acquitted of the robbery, he had also, within the issue, been tried and acquitted of the larceny. As in the present case, the defendant might have been convicted, upon the indictment, of either robbery in the first degree or grand larceny; yet as he was convicted of neither offense, but of an entirely different one, the verdict operated as an acquittal, and he could not again be arraigned and tried for either.

With the concurrence of the other judges, the judgment must, therefore, be reversed.

STATE OF MISSOURI, Respondent, *vs.* NICK D. WYL, Appellant.

1. *Dram-shop licenses—Where wine may be sold without paying license—Const. Stat.*—Under the statute (Wagn. Stat., 1872, p. 554, § 29,) there can be but one place where it is lawful to sell wine without first obtaining a license for that purpose, and that is on the premises where it is produced or manufactured.

Appeal from Cole Circuit Court.

Lay & Belch, for Appellant.

H. Clay Ewing, Att'y Gen'l, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an indictment against the defendant for selling wine and beer without a license. A jury being waived, there was a trial before the court, and the evidence showed, that defendant had, at different times, and to different persons, sold wine of his own production and manufacture, without having any license authorizing him to sell; that the wine was manufactured or produced from grapes grown by defendant in Cole county, a short distance from Jefferson City where it was sold; that defendant had a house of his own in Jefferson City, not connected with his vineyard or place where the wine was manufactured, and that there he sold the wine, but no other liquors, and that some of the wine after its removal to Jefferson City went through a second fermentation. This was all the evidence in the case.

For the State a declaration of law was given, that although the court might believe that defendant sold only wine of his own growing and production, yet if it should further believe from the evidence that the premises, upon which the sales were made, were not the same where the wine sold was either manufactured or produced, then the defendant should be found guilty.

The court refused an instruction which was mainly the converse of the one above given, which was asked by the defendant, and then rendered judgment for plaintiff.

The decision must be governed by construing the act of

1871, (1 Wagn. Stat., p. 554, § 29, Ed. of 1872,) which provides that "no person not having a license as dram-shop keeper shall, directly or indirectly, sell beer, cider and native wine, the latter the growth and manufacture of this State, in less quantities than one gallon, without taking out a license as wine and beer-house keeper; *provided, however*, that this section shall not be construed as authorizing a license to be levied upon, and collected from, any wine grower for selling wine of his own production, in any quantity, on his own premises."

By the word "premises" in the section is undoubtedly intended the place where the wine was produced or manufactured. The premises for production or manufacture need not necessarily be in or upon the vineyard where the grapes are grown. A man may well have his vineyard at one place, and his wine cellar and appliances for making and producing wine at another, and this last place, where the wine was actually made and stored, would be, I think, the premises contemplated by the law. That he could sell there without a license, cannot be for a moment doubted. But if, in addition to this, he could bring his wine into town and sell it out he would be allowed the privilege of selling in two places, and if he can sell in two he can sell in a dozen, and thus he might sell wine all over the county, if he happened to own property in different townships, and call it selling on his premises.

The law was not designed to have this unrestricted scope and operation. Under such a construction houses might be established and multiplied in every direction, and the owners would neither contribute to the revenue, nor be under any of the salutary restraints imposed by the law in reference to wine and beer houses.

In my judgment there can be but one place where it is lawful to sell wine without first obtaining a license for that purpose, and that is on the premises where it is produced or manufactured. Under the instruction the court must have found that the wine was sold at a place other than where it was produced or manufactured, and that finding is final on us.

As to some of the wine fermenting after it was removed to town, we regard that a matter of no importance in the case. It is well known that native wine ferments at certain periods for years after it is manufactured, and the fermentation would have been just the same had it been produced and sold in the market to any other person.

The judgment should be affirmed. The other judges concur.

STATE OF MISSOURI, Respondent, *vs.* EDWARD DOUGHERTY, Appellant.

1. *Criminal law—Separation of jury—When not a ground for new trial.*—The mere fact of the separation of the jury will not invalidate the verdict or furnish grounds for new trial, unless it be made to appear that they have been tampered with, or that they have acted improperly.

Appeal from Jasper Circuit Court.

J. F. Hardin, for Appellant.

H. Clay Ewing, Att'y Gen'l, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The accused was convicted of murder in the second degree, and it is urged, that the court erred in giving instructions; but the instructions are not embodied in the bill of exceptions; moreover, no objections were made to any ruling of the court at the trial, and no exceptions were taken or saved. It is therefore obvious, that there is nothing presented by the record, calling for a revision in this court.

An affidavit accompanied the motion for a new trial, stating that on one occasion, during the progress of the trial, the officer permitted the jury to separate; but it is not alleged or pretended, that they were guilty of any improper practices, or that they were in anywise tampered with.

The rule has long been established here, that the mere

fact of a separation of the jury in a criminal case will not invalidate a verdict, or furnish grounds for a new trial, unless it is made to appear, that they have been tampered with, or that they have acted improperly. (State vs. Matrassey, 47 Mo., 295; State vs. Brannon, 45 Mo., 329, and cases referred to.)

The indictment was sufficient, and we see no error in the record.

Judgment affirmed. The other judges concur.

D. T. Wright, *et al.*, Plaintiffs in Error, *vs.* J. G. Sheur, *et al.*, Defendants in Error.

1. *Practice, civil—Supreme Court—Bill of Exceptions—Filing of, etc.*—Where a bill of exceptions is not filed in time, it may be stricken out on motion.

Error to Moniteau Circuit Court.

Edmund Burke, for Plaintiffs in Error.

Owens & Woods, for Defendants in Error.

Adams, Judge, delivered the opinion of the court.

This was a proceeding by way of garnishment by the plaintiffs, as execution creditors of Henry Myer, against the defendants as debtors of said Meyer. The whole contest grew out of the issues raised by the defendants' replication to the denial of their answer as garnishees. The denial alleged, that the defendants were indebted to Meyer for a balance due under a contract with defendants for building a church. The replication denied such indebtedness. The defendants admitted that they made the contract as stated, but claimed, that Meyer had failed to perform the contract, and that he had used bad materials and violated his contract, and had damaged them in the sum of one thousand dollars; that they had more than paid him for the performed work. This was in substance the reply.

The case was submitted to a jury, and they found a verdict for the defendants, upon which the court rendered a final judgment. There was no bill of exceptions filed in time, saving the evidence or anything that occured upon the trial. As the bill of exceptions was not filed in time, it was stricken out here on motion. There was a motion in arrest assigning as a reason, that the replication denying the plaintiffs' denial of defendants' answer, and the matters set up in the same, were not sufficient in law to authorize a judgment in favor of the defendants. This motion was overruled, and to this opinion exceptions were duly taken.

There seems to be nothing in the point raised by the motion in arrest. The replication setting up breaches of Myer's contract, and claiming damages to more than the amount of the balance alleged to be due on account of the work done, was certainly a good defense.

Judgment affirmed; all the judges concur.

JACOB BUCKWALTER, Respondent, *vs.* JAMES CRAIG, Appellant.

1. *Principal and agent—Taking of notes in satisfaction of claim—Authority—Ratification.*—If an agent has no authority to receive anything but money upon a claim, no arrangement of his to receive notes in payment will bind his principal, unless ratified by the latter with a full knowledge of the facts.

Appeal from Jackson Circuit Court.

Karnes & Ess, for Appellant.

Twiss & Cook, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, who resides in the State of Iowa, brought his action against the defendant, in the Jackson County Circuit Court, on a judgment, which he obtained in that State. The defendant, in his answer, pleaded payment of the judgment

and a reply was filed, putting the fact of payment in issue, and this was the only issue joined in the cause. At the trial the defendant did not attempt to prove payment of the entire judgment, but endeavored to establish a credit of $1,500 on the same. From the facts disclosed in the bill of exceptions, the following are substantially the circumstances, from which the credit is claimed:

In 1869, the plaintiff, who resided near Mt. Pleasant, Iowa, sent his brother-in-law, Jacob Kauffman, who lived near the same place, to Kansas City, where the defendant resided, to get the money on the judgment, or to bring suit upon it. Kauffman called upon Craig, the defendant, and informed him, that he had come to get the money on the judgment. Craig said, that he had no money on hand, but proposed to give Kauffman an order on Charles Hendrie of Burlington, Iowa, who was indebted to Marsh & Craig, a firm composed of James E. Marsh and the defendant; and, in reply to Kauffman's objections in regard to the solvency of Hendrie, stated that Marsh would go up to Iowa shortly and attend to the matter, and that Marsh would be able to induce Hendrie to pay the order. Kauffman then returned to Iowa and waited for a week or ten days until Marsh came to Mt. Pleasant, and then arranged with Marsh to go to Burlington and see Hendrie. He went, accordingly, and failing to meet Marsh on the train, or at Burlington, called on the son of Hendrie, who was doing business for his father, who took up the order, and gave therefor two notes of the senior Hendrie for $750.00 each, drawn in favor of the plaintiff. Kauffman received these notes, stating at the time, that he would not take them as payment on the judgment, but that he was willing to credit their amount on the judgment, when the notes were paid; and that he would submit the notes to Marsh for approval of these terms. He returned to Mt. Pleasant that evening, and met Marsh on the train as he returned; told Marsh what he had done and showed him the notes. Marsh said, that if he kept the notes he must take them as payment and credit them on the judgment, to which Kauffman replied, that he would not

do so; that he had no authority to take notes, or anything else except money, on the judgment. He then gave up the notes to Marsh, who handed them back and agreed to meet him at the bank in Mt. Pleasant the next day and settle the matter.

The next day he met Marsh on the street, who went with him to the clerk's office and examined the record to see the amount of the judgment. While there, Marsh again attempted to persuade him to credit the judgment with the amount of the notes, which he again refused to do, and gave as before, as a reason for not doing so, that he had no authority for doing it. They then went together to the National State Bank of Mt. Pleasant, when Marsh took the notes given by Hendrie for the order given by Craig, and left them with the bank, taking a receipt, which specified that the notes were to be collected by the bank, and the cashier was to see the amount so collected credited on the judgment, when he was to pay the proceeds to Kauffman for the plaintiff, and farther specifying, that if this arrangement was not satisfactory to Craig, the notes were to be given up to Craig upon his advising the bank of that fact. Marsh then wrote at the foot of this receipt an agreement, that no execution should issue on the judgment until the first of March following, at which time both of the notes would be due, and Kauffman signed the agreement, as agent for plaintiff, and Marsh then took the receipt and agreement away with him. These notes, when due, were sent to Burlington for payment, and, not being paid, were sent by the bank at Mt. Pleasant to the First National Bank at Kansas City to be delivered to Craig and the receipt taken up. They were not received by Craig, and were returned to the bank at Mt. Pleasant, and have not been paid. At the trial these facts were proved by the testimony of Kauffman, and by the depositions of the Cashier and President of the National State Bank at Mt. Pleasant. In additon to this testimony, Buckwalter, the plaintiff, gave his deposition, in which he testified, that he never gave Kauffman any authority to receive anything but money on the judgment; that he believed Craig knew this fact, as Craig had tried to get Kauffman to receive prop-

perty on the judgment, which offer Kauffman had referred to him, and which he had declined; that he (plaintiff) had been informed, that Marsh (Craig's partner,) had deposited some notes, belonging to Craig, in bank at Mt. Pleasant, the proceeds of which, when paid, were to be applied to his judgment, and, in view of the prospect of making the money without suit, he had consented to forbear bringing suit on the judgment until the notes became due. On the other hand, Craig, who had been notified to produce the receipt taken by Marsh, failed to do so, and swore that Marsh never showed it to him; that he never had it or knew of it till he saw the depositions taken by the plaintiff. Marsh also testified, that he never saw the notes given by Hendrie to Kauffman, and only gave Craig the order on Hendrie, which he took up in Hendrie's hands; but he afterwards modified this statement, saying that he had no recollection of taking a receipt from the bank for these notes, but that he might have done so, and if he did he gave it to Craig. The trial was before the court, sitting as a jury, and the finding and judgment were for the plaintiff.

The instructions and declarations of law, asked for and given, sufficiently show the theory on which the court based its verdict and decision. They proceed upon the idea, that if Kauffman had no authority to receive anything but money on the judgment, then any arrangement that he made in respect to taking notes on the order did not bind the plaintiff, unless ratified by him with a full knowledge of the facts; and that, if from all the facts and circumstances of the case, it appeared that Marsh was authorized to arrange or adjust, or act for the defendant in adjusting and settling, with the plaintiff the matter in dispute, then the defendant was bound by the acts of Marsh. These declarations, when applied to the facts disclosed by the evidence, were substantially correct. There is nothing in the testimony on either side to show that Craig, the defendant, did believe or had any reason to believe, that Kauffman had any authority other than to receive the money or bring suit upon the judgment. This the court must have found, and

also that the plaintiff never ratified any unauthorized act committed by him in the matter of taking notes in lieu of money. The court must have further found from the evidence, that Marsh had either a general or special power from the defendant to enter into the agreement and make the adjustment for him.

The weight of evidence was for the court sitting as a jury, and it was abundant to warrant the conclusion arrived at. The law was correctly declared, and the judgment was obviously just, and should be affirmed.

Judgment affirmed. The other judges concur.

STATE OF MISSOURI, Respondent, *vs.* NED. BRYANT, Appellant.

1. *Practice, criminal—Rule of court—Right of attorneys to cross-examine.*—Where two defendants in a criminal trial were represented each by separate counsel, and required different defenses, *Held*, that a rule of court forbidding more than one counsel on either side to examine witnesses, in so far as it deprived either of said attorneys of the right to cross-examine witnesses, was null and void.
2. *Homicide—Evidence—Character of deceased, as violent, etc., shown when.*—In a case of homicide, where it is doubtful whether it was committed with malice or from a well-grounded apprehension of danger, it is proper to show that the deceased had the reputation of a violent or dangerous man.
3. *Practice, criminal—Instructions as to degrees of a crime.*—Whenever the evidence shows that a defendant may well be convicted of either of different degrees of the crime charged, the jury should be informed by the Court, in what those degrees consist.

Appeal from Greene Circuit Court.

Ellis, & Patterson, for Appellant.

I. The right of cross-examination is an absolute one, and essential to the competency of testimony. (1. Greenl. Ev., § 446.)

II. The court erred in not instructing the jury as to what constitutes murder in the second degree. (State vs. Matthews 20 Mo., 55: State vs. Wyatt, 50 Mo., 309.)

III. The court prescribed as the regulation question, to reach the character of the deceased, this, "What was his reputation for peace and quiet, in the community in which he lived, good or bad?" And refused to permit the defendant, to ask the two questions. 1. "Do you know McGee's reputation in his life-time in this community, for being a dangerous and desperate man?" 2. "Did you know what his reputation in this community was for going around armed?" These questions should have been permitted. (State vs. Keene, 50 Mo., 357.)

H. Clay Ewing, Attorney General, for Respondent.

I. The indictment was for murder in the first degree, and the court by instructions defined that crime—no other offense is charged. Even under the first instruction alone, without any other, the jury would be justified in finding the defendants guilty of murder in the second degree, or of any degree of manslaughter. The case of the State vs. Matthews, 20 Mo., 55, does not lay down a different rule.

II. It is conceded that defendants are entitled to cross-examine witnesses, and it will be seen by examination of the evidence in the record, that the defense of each was identical; and the case made by the attorneys, was simply to embarrass the proceedings. Legitimate cross-examination was not refused, and the discretion of the court was soundly exercised. Besides, no intimation is given as to the purpose of such further cross-examination.

Wagner, Judge, delivered the opinion of the court.

One Tilly, and the defendant Bryant, were indicted in the Greene Circuit Court for murder in the first degree in killing a man by the name of McGee. On the trial they were convicted of murder in the second degree, and Tilly was sentenced to the penitentiary for life, and the defendant for the term of fifteen years. They were tried jointly, and defendant has alone appealed to this court. The principal questions relied upon arise out of the action of the court in its ruling in regard to the admission and rejection of testimony, and its

neglect to give necessary instructions. The parties are all colored, and it seems that the difficulty arose and the homicide was committed at a ball, which they attended. The evidence shows very clearly that McGee, the deceased, at the time he was killed, had grappled the defendant, and was trying to pull a slung shot out of his (Mc Gee's,) pocket, when Tilly, who was defendant's friend, stabbed him with a knife, from which wound he died.

Shortly after this occurrence, Tilly and the defendant left, and they were apprehended a few days afterwards with some horse drovers, and were assisting in driving the horses. They were coming in a direction which might lead to their home, where the crime was committed. On cross-examination it was proposed to show, that, when they were arrested, they said that they had been to see some relations, and were on their return home. This evidence was objected to, and excluded by the court. We see no reason for questioning the soundness of the ruling in the rejection of this evidence. It was not brought forth as a part of any conversation had on that subject.

It does not appear, that anything was said at that time in reference to Tilly and defendant making their escape, nor is the matter noticed, either in the evidence or the instructions. There is no intimation anywhere to be found, that the prosecution ever relied upon the fact of flight, as the slightest evidence conducing to establish guilt. Under such circumstances the defendants could not give in their own declarations in their favor.

The defendants were both tried together, and after the trial was begun, and had proceeded for a time, it was discovered that their interests came in collision. There is a rule of the Circuit Court, forbidding more than one counsel on either side to examine witnesses. The defendants were represented by different counsel, and the counsel for Tilly was conducting the cross-examination. Defendant's counsel desired to question the witness in regard to matters which were deemed material to his defense, but which were regarded as damaging to Tilly, the co-defendant. The court refused to allow

defendant's counsel to put the questions, but said they might be asked through Tilly's counsel; Tilly's counsel declined to examine, because it would be prejudicial to their client's interest, and thus the defendant lost the benefit of the testimony.

The rule relied upon is inserted in the transcript, and we have examined it, and think that the court misinterpreted it, and that it was not designed to apply to a case of this description. But be that as it may, we hold that it was not in the power of a court to adopt any rule, which would deprive a defendant in a criminal case of the right of cross-examination.

This right is one of the essential tests of truth in the examination of testimony, and any rule, regulation or order, which goes to deprive a party of its benefits, is illegal and void.

The defense further proposed to show that the deceased was a desperate and dangerous man. This the court would not permit, and would only allow his reputation for peace and quiet to be submitted in evidence. It is only necessary to refer to the cases of the State vs. Hicks, (27 Mo., 588,) and the State vs. Keene, (50 Mo., 357,) to show that the court erred in this respect. Whilst it is perfectly true that the character of the deceased affords no justification, and will not even palliate the crime, where it appears that the defendant was the aggressor, and provoked the altercation, still it frequently becomes of great importance in determining the degree and quality of the offense. A bad man, as well as a good one, is equally under the protection of the law, but in a case of homicide, where it is doubtful whether it was committed with malice or from a well grounded apprehension of danger, it is necessary to take into consideration the fact, that the deceased was desperate, violent or dangerous. A peaceable, well-disposed man, although in anger, might excite very little fear, whilst the menacing attitude of a cruel, vindictive and desperate person would cause the greatest apprehension, and justify a line of action in the one case, which would be wholly unwarrantable in the other. It is therefore evident, that the characteristics of the deceased with the restrictions placed upon them by the court did not meet the case. A man may not

be peaceable, and still have nothing dangerous about him; he may be the very reverse of quiet, and yet not in any way dangerous or desperate. The very traits of character, which it was important to show as throwing light upon the character of the offense, were the very ones which the court would not permit to go to the jury.

The instructions principally complained of are in reference to Tilly, and have no bearing against the defendant, and as Tilly did not appeal, and is not before this court, we cannot notice them. In the main, the instructions given for the State were correct, but in them there was a palpable omission. The indictment was for murder in the first degree, and it was competent for the jury on this indictment to find the defendant guilty of murder in the second degree, or any of the lesser grades of manslaughter. The court defined what constituted murder in the first degree, and then instructed as to the punishment in the other degrees, but did not undertake to define what constituted them. In this there was a manifest error. Whenever the evidence shows that a defendant may well be convicted of either of different degrees, the jury should be informed by the court in what those degrees consist, otherwise the jury may be misled, and assess a punishment against a defendant for an offense of which he is not guilty. (State vs. Sloan, 47 Mo., 604; State vs. Wyatt, 50 Mo, 309; State vs. Matthews, 20 Mo., 55.)

No other points have been discovered in the record deserving of any especial mention. The judgment must be reversed, and the cause remanded.

All the judges concur.

STATE to use of MARIES COUNTY, Respondent, *vs.* SAMUEL JOHNSON, *et al.*, Appellants.

1. *County treasurer—Failure to pay over school funds—Liability on what bond.*—The sureties on the general bond of a county treasurer are not liable for his failure to account for, and pay over to his successor in office, county and township school funds. For the special duties imposed upon him by the school law he is answerable on a separate bond.

Appeal from Maries Circuit Court.

Lay & Belch, for Appellants.

I. Defendants were in no wise liable for any default or failure of their principal to pay over school monies. The treasurer must give a separate bond for that. (Wagn. Stat., 1251, § 42.)

P. J. Seay, for Respondent.

I. Section 5, p. 410, Wagn. Stat., 1870, provides that the treasurer shall give bond to the county "for the faithful performance of the duties of his office." One of his duties of his office is to receive and pay over school monies, and for failure to do this he is liable on his bond. It is true, that a separate bond is required, but suppose it is not given. He gets the school monies on the faith and credit, that the bond which he has given will secure the payment of any monies which he may fail to pay over. The apparent object of the legislature, in requiring an addition bond to be given as a security for school monies, was not to relieve the sureties who go upon the first bond, but to make the assurance greater that no loss should come to the school fund, a fund which is, and should be, regarded by the legislature and the courts as the most sacred.

II. But if the bond should be held insufficient under the statute, it was good at common law. (State vs. Thomas, 17 Mo., 503.)

III. See generally Western Boatmen's Ben. Association vs. Kribben, 48 Mo., 37.

ADAMS, Judge, delivered the opinion of the court.

This was an action on the official bond of Samuel Johnson as treasurer proper of Maries county. The action was commenced against Johnson and his sureties in Maries county, and taken by change of venue to Osage County. No service was had upon Johnson, who was a non-resident of the State.

The petition charged breaches of the bond in not accounting for, and paying over to his successor in office, county and township school funds. The answers of the defendants set up the defense that there was no default under this bond; that they were not liable on the bond for a default in school monies. The bond was given in 1867. The evidence showed no default at all on account of monies belonging to the county. The only default known was in not accounting for school monies held by him as treasurer for school purposes, belonging to the school townships.

The case was submitted to a jury, and the defendants asked an instruction demurring to the evidence, which the court refused. The court also gave an instruction to the effect, that, if the jury find from the evidence that the treasurer was in default for school monies, it was a breach of his bond and entitled the plaintiff to recover. The jury found for the plaintiff, and a motion for a new trial was overruled, and final judgment entered on the verdict for the plaintiff.

This case is governed by the General Statutes of 1865, which however in reference to the points involved are the same as the existing statutes.

The county treasurer proper, under § 5 Genl. Stat., 1865, p. 226, was required within ten days after his election or appointment to enter into a bond to the county, in a sum not less than twenty thousand dollars to be fixed by the County Court, with such sureties resident house-holders as should be approved by the County Court, conditioned for the faithful performance of his official duties. Under this bond he could only pay out monies belonging to the county, and only on warrants drawn

by order of the County Court. (See § 7, Genl. Stat., 1865, p. 227.)

The school law provides, that the county treasurer in each county shall be the treasurer of all funds for school purposes belonging to the different townships, arising from whatever source; and on his election, before entering upon his duties, he shall give a separate bond with sufficient security in double the probable amount of school monies that shall come to his hands, payable to the State of Missouri, conditioned for the faithful disbursement according to law of all such funds, and on the forfeiture of the bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various townships. It is also provided that, if the clerk fails to prosecute, then any freeholder may cause such prosecution to be instituted on the bond. (§ 31, p. 265, Gen. Stat. 1865.) It is also provided, that the county treasurer shall settle with the county clerk for the school funds in his hands. (§§ 32–33.)

These provisions of the statute, and others in the school law, conclusively show that the office of treasurer of the school funds is a distinct office from that of general county treasurer. Although the same officer must perform the duties of both offices, he is required to give separate bonds. The duties in each case are entirely distinct. The sureties on the general bond are only held for his duties as county treasurer proper, and not for the special duties imposed on him by the school law, for which a separate and distinct bond is required.

In my judgment the defendants' demurrer to the evidence should have been sustained, and the plaintiff's instruction refused. As there seems to be no pretense that there was any breach of the bond sued on, there will be no necessity for remanding the cause.

Judgment reversed. The other judges concur.

STATE OF MISSOURI, Defendant in Error, *vs.* W. SHERMER, AND JAS. SHUMAKER, Plaintiffs in Error.

1. *Larceny—Evidence—Time of going off with property—Declaration then as to his motives and designs.*—On a trial for larceny the prisoner cannot make evidence for himself by adducing his own declarations as to his motives and designs at the time he went away from his home with the property.
2. *Larceny—Arrangements made to return property at time of taking—Evidence as to.*—In larceny for stealing a horse, evidence was held admissible to show that just before taking the horse away, the prisoner had made arrangements with a third person to return the animal to his owner after he had been driven to a certain town. Such evidence was proper to explain the conduct of the prisoner and to show his intention at the time of leaving.
3. *Criminal law—Larceny—Property must be taken animo furandi.*—The taking of property without the *animus furandi* cannot constitute the crime of larceny. Thus, where property was delivered to defendant under contract of sale, part of the purchase money to be paid on time, and the purchaser to retain and use the property meanwhile, and there was no pretense, that at the time of the sale he had a felonious intent, he cannot be held guilty of larceny, from the fact that, after keeping and using the same for several months under the contract, he carried it away without completing the payment.

Error to Cole Circuit Court.

E. L. King & Brother, for Plaintiffs in Error.

I. If the defendants come into the possession of the horses lawfully (and there is no question on this point), it will not be larceny to afterwards conceive the intent to convert them to their own use. (State vs. Conway, 18 Mo., 321; State vs. Williams, 35 Mo., 229.)

H. Clay Ewing, Att'y Gen'l, for Defendant in Error.

I. Intent is the essence of the crime of larceny, but it is not necessary that it should be found at the time of taking the property. It has been held by this court, that, where one comes in possession of property lawfully and afterwards conceives the idea of stealing, he is guilty of larceny. (Morton vs. State, 4 Mo., 46.)

II. There is no law nor common justice in support of the decision of the court in the case of State vs. Conway, 18 Mo., 321, and it is only justified by the circumstances in the case. The court admits the crime and then tries to excuse it.

WAGNER, Judge, delivered the opinion of the court.

The defendants were tried, convicted and sentenced to the penitentiary for the crime of grand larceny. It appears from the record, that one Marshall sold and delivered to the defendants two horses, one wagon and some harness, for which they were to pay him in work, and that they were to be considered the property of Marshall till paid for. The defendants, after they received possession of the property, did work at different times, and paid some of the purchase money, but after having had possession for several months, and, without paying the whole of the price agreed upon, they took the horses and wagon and started for Lebanon, in Laclede County, ostensibly to obtain work on the railroad. They traveled on the plain road, in open daylight, without haste or concealment. Marshall, finding that they were gone, pursued and arrested them, brought them back and had them indicted in Cole County for larceny, At the time they were arrested, they frankly admitted that the property still belonged to Marshall, and said that, on their arrival at Lebanon, they had made arrangements to send it back.

Marshall, who was sworn on behalf of the State, was permitted to give his version of the terms of the contract of sale, and a witness was introduced by the defendants in reference to the same matter. He swore, that he had heard Marshall and the defendants talk about the sale, and then was asked by defendants' counsel, if he had heard Marshall say that he had sold the team to defendants, to state upon what terms he said he had sold the team. Strange as it may seem, the court sustained an objection to this question and ruled it out. For what reason, it is a little difficult to understand. Marshall had been allowed to testify freely and fully what he considered to be the contract, but, when the defendants attempted to show what were the terms agreed upon, in the only manner in which it was permissible for them to show that fact, they were stopped by the court, and the testimony was excluded. This was manifestly erroneous.

The defendants offered in evidence declarations by them, as

explanatory of their motives and designs, when they were about to leave home. But this the court excluded. The evidence was clearly inadmissible. The defendants could not make evidence for themselves by adducing their own declarations. But they went further and offered to show that they had made arrangements with a third party to bring the team back after they had driven it to Lebanon, and this offer was refused. I think they should have been permitted to introduce the testimony. The evidence did not simply go to their words, but to their acts also, and was competent to explain their conduct, and show their intention at the time of their departure.

Numerous instructions were given and refused, and many of them had no bearing whatever upon any issue involved in the case. It is only necessary to notice one given for the State, and one refused for the defense, to show the theory upon which the court tried the case. For the State, the court gave the following instruction: "The jury are instructed, that, if they believe from the evidence, that the said horses, wagon and harness were, by the contract of sale, not to be the property of the defendants until they were paid for, then the jury are instructed, that, until they were so paid for, they continued to be the property of the said Marshall, and, if the jury further believe from the evidence that the defendants did, without the permission of the said Marshall, take the property away into another part of the State, and that they did so with the intent to avoid their said contract with the said Marshall, and to convert the said property to their own use, and thereby to cheat and defraud, by their acts, the said Marshall out of his said property or any interest which he may have had in the said property, on account of anything remaining unpaid on account of the purchase money by the said defendants, then the jury should find the defendants guilty, and assess their punishment as before stated." The following instruction, asked by the defendants, was refused: "If the jury believe from the evidence, that the defendants took and used the horses, &c., for the purpose of making a trip to Lebanon, and, of their either

returning with the team, or of returning the team by another person, then the jury will find the defendants not guilty."

It is an established principle of law, that larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*. The authorities referred to in State vs. Williams (35 Mo., 229) abundantly illustrate this. Thus, in Pear's case (2 East P. C., 685) it was held, that hiring a horse on pretense of taking a journey, but, in truth, with the intent to steal it, and evidencing such felonious intent by selling the horse, was larceny.

In Spencer's case (Lew. C. C., 197) the prisoner went to the house of the prosecutor and asked him if he let horses out to hire, and if he could have one to go to Stockport, a distance of about seven miles. The prosecutor let him have a mare, and the prisoner mounted her, and rode away, but in a different direction from Stockport, and the next day offered the mare for sale, alleging that she belonged to him. Bayley, Judge, charged the jury, that, if a person gets possession of a horse by hiring, meaning at the time not to use it for the purpose for which he states he hired it, but to endeavor to make it his own, he is guilty of stealing. "In these cases," he said, "the guilt or innocence of the party depends upon what passed in his mind at the time, and this is to be inferred from circumstances; if you find, that, instead of going to the place where he said he was going, he went elsewhere, it raises a presumption that he meant to deprive the original possessor of his horse." But the rule is, I believe, universal, that to constitute larceny the intention to steal must have been formed at the time of the taking.

Witt vs. The State (9 Mo., 663), is a case much stronger than the one at bar for the prosecutor. There the court had instructed the jury, that, if they believed from the evidence that the horse belonged to Smith, and that the prisoner took and carried away the horse, without the knowledge and consent of Smith, with the intention of selling him or of converting him to his own use, they ought to find him guilty. And, although the jury might believe from the evidence, that

Smith, in the contract spoken of, had agreed that the prisoner might ride the horse, yet, if they believed the prisoner took the horse with the intention of selling him, or of converting him to his own use, they ought to find him guilty. The instruction was held to be erroneous, and it was declared that the facts assumed constituted merely a trespass and not larceny. Scott, Judge, speaking for the whole court, said, that there could not be a larceny without a felonious intent; that the taking of the personal goods of another without this intent might be a trespass, but it could not amount to larceny.

The prisoner might have done every act supposed by the instruction without being guilty of a felony. So, in the case of the State vs. Conway (18 Mo., 321), it was held, that there could not be a larceny without a felonious intent at the time of taking; that the taking might be a trespass, but it could not amount to a larceny. The case, as made out by the State, shows conclusively that the property was delivered to the defendants under a contract of sale, and that they were in the possession of it for several months, holding and using it under the contract. As it is not anywhere pretended that they had any other than an honest intent at the time they contracted for the property and received possession of it, it is utterly impossible to impute to them the crime of larceny. The court erred, and its judgment should be reversed, and the cause remanded.

The other judges concur.

STATE OF MISSOURI, Respondent, *vs.* FRITZ DROGMOND, Appellant.

1. *Practice, criminal—Indictment—Grand Jury—Plea in abatement.*—An objection that certain members of a grand jury were discharged by the court and others sworn in their places, and that being so altered the jury found the indictment, cannot be raised by plea in abatement.

Appeal from Jackson Circuit Court.

Johnson & Botsford and F. A. Mitchell, for Appellant.

I. There is no provision in the statute authorizing a court to discharge grand jurors, and substitute from by-standers peremptorily as charged in the plea in abatement. The body thus constituted was illegal, and the bill found by them against appellant was void. (Wagn. Stat., p. 799, § 11.)

II. The objection made by the plea was not "a" challenge to the array of grand jurors, or to any person summoned as a grand juror within the meaning of Wagn. Stat., 1081, § 3. That section refers to the array of grand jurors as originally constituted, or to a juror originally summoned as one of the regular panel. It was not designed to forbid an objection like this where the court on its own motion and without cause, illegally changed the original panel, thereby creating a new and unlawful body wholly unknown to our laws. (State vs. Beekley, 18 Mo., 428; State vs. Welch, 33 Mo., 33; State vs. Connell, 49 Mo., 283.)

H. Clay Ewing, Att'y Gen'l, for Respondent.

I. The court did not err in sustaining the demurrer to the defendant's plea in abatement. The court at any time has the right to discharge from the panel a grand juror, who may not be qualified to act as such, and have his place supplied by one who is legally qualified to act. (1 Wagn. Stat., p. 799, § 10.) Will it be contended that the court could discharge one who is not qualified to act, upon his being challenged, and yet if he is not challenged, and the same information as to his want of qualification comes to the court he cannot be discharged. (Comm. vs. Burton, 4 Leigh., 645; Jetton vs. State, Meigs, [Tenn.,] 192; State vs. Jacobs, 6 Tex., 99.)

II. By the plea of "not guilty" any objection that might have existed to the grand jury was waived. (Commonwealth vs. Chauncey, 2 Ashmead, 90.)

III. In absence of proof to the contrary, it will be presumed that jurors were discharged for a legal cause, and that the court acted by authority. (Easterling vs. State, 35 Miss., 210.)

ADAMS, Judge, delivered the opinion of the court.

The defendant was indicted for selling liquor on Sunday. He filed a plea in abatement, alleging that several of the grand jurors, during the progress of the court at which the indictment was found, were discharged by the court and others sworn in their places, and that the grand jury after thus being changed and constituted, found this indictment. The State's attorney demurred to this plea, and the demurrer was sustained. The defendant afterwards pleaded not guilty was tried and convicted. The only matter complained of here, is the action of the court in sustaining the demurrer to the plea in abatement. A plea in abatement is not the proper mode of raising objections to grand jurors. If it were, this plea does not state the grounds, on which the court acted in discharging the jurors and summoning others in their places. Under certain contingencies the court has the right to do this. If a grand juror fails to attend, or is found to be incompetent, after he is qualified, the court may in its discretion cause another juror to be summoned and sworn. (1 Wagn. Stat., 799, § 10.) Objections to jurors must be made before they are sworn. The objection raised by this plea, is to the array, that is to the panel. Such objection cannot be presented by a plea in abatement. (Wagn. Stat., 797, § 3; *Id.*, 1081, § 3; State vs. Bleekley, 18 Mo., 428; State vs. Welch, 33 Mo., 33; State vs. Connell, 49 Mo., 282.)

Let the judgment be affirmed. The other judges concur.

STATE OF MISSOURI, Respondent, *vs.* JOHN W. ARNOLD, Appellant.

1. *Evidence—Married woman—Declarations of—Testimony concerning.*—As to matters, touching which a married woman is an incompetent witness, testimony concerning her declarations is inadmissible.

2. *Criminal law—Guardian—"Other persons"—Defiling girl under eighteen—Construction of Statute.*—In a prosecution under the statute (Wagn. Stat., p. 500,

391) for defiling a girl under eighteen years of age, *held*, that mere permission given her to help the prisoner plant corn was not confiding her to his care and protection within the meaning of the law. The statute contemplated that the "other person" should stand in a position similar to that of a guardian, not necessarily that of legal protector, but in an attitude of special trust, care and supervision.

Appeal from Franklin Circuit Court.

Seay & Kiskaddon, for Appellant.

H. Clay Ewing, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted and convicted for defiling a female under the age of eighteen years, who it was alleged, was confided to his care under the statute (1Wagn. Stat., 500, § 9), which provides, "If any guardian of any female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her," he shall be punished, &c. A technical objection has been urged against the indictment, but it is, perhaps, substantially sufficient after verdict, under the very liberal system prevailing with us in reference to practice in criminal cases. (2 Wagn. Stat., 1090, § 27.) But we are of the opinion, however, that the judgment must be reversed, because the court erred in admitting illegal testimony, and because there was a total want of testimony to sustain the verdict.

The only evidence of any importance, given on behalf of the State, was that of the female—who, it appears, was defiled—and that of her father. By this evidence, it is shown, that the girl was the sister-in-law of the defendant. She testified that on the 11th day of May, 1871, her sister, defendant's wife, came to her father's house and told her father, that defendant wanted him to let her go over to defendant's and help him plant corn that day; that her father gave his consent, and that she accordingly went, and that whilst assisting that day in corn planting, defendant had carnal knowledge of her. The evidence of the father corroborated that of the girl, and was of the same import.

There was an objection interposed against admitting testimony as to what defendant's wife said, but this objection was overruled. Nothing is clearer than that it is incompetent for the wife to give evidence against the husband, except in the case where she is the immediate prosecutrix for some injury threatened or done to her person. If she herself is not a competent witness, it follows, that her declarations as to what her husband said must also be inadmissible.

Allowing the girl to go and work for the defendant in helping him to plant corn, was not confiding her to his care and protection, within the meaning of the statute. The statute declares, that if any guardian of a female or other person, to whose care and protection she shall have been confided, shall commit the offense, he shall be punished, &c. The guardian is specifically named, and then any other person to whose care and protection the female is confided is mentioned. The statute here certainly contemplated, that the other person alluded to, should occupy a position similar to that of guardian, or stand in some attitude in which a peculiar or confidential trust was reposed. It would not be necessary that he should be the legal protector of the female, but it would be necessary that she should have been committed to his especial care, with the expectation that he should exercise a supervision over her. The defendant stood in no such attitude. The female was allowed to go and assist him in laboring for one day, but there is no evidence that she was specially confided to his protection and care, as designed by the statute. However immoral and reprehensible his conduct may have been, there was no evidence to convict him according to the provisions of the statute, under which he was indicted. The instructions, therefore, asked by the defendant should have been given.

The result is, the judgment must be reversed and the cause remanded. The other judges concur.

J. R. ARNOLD, Defendant in Error, *vs.* JAS. TRASK, *et al.*, Plaintiffs in Error.

1. *Chancery—Decree—Petition dismissed without prejudice.*—Decree held not supported by the evidence, judgment reversed, and petition dismissed without prejudice.

Error to Crawford Circuit Court.

A. J. Seay, for Plaintiffs in Error.

Pomeroy & Clark, for Defendant in Error

SHERWOOD, Judge, delivered the opinion of the court.

This, it would seem, was an equitable proceeding to divest the title out of the heirs of Marion W. Trask and vest the same in the then plaintiff, William Carroll. James R. Arnold is then allowed to take part in the litigation on his own responsibility, and on his own behalf, and is made a party to the suit, but whether plaintiff or defendant does not appear. Then Carroll dismisses his suit, and Arnold, after many ineffectual attempts in that direction, finally succeeds in becoming plaintiff in the suit, obtains a decree vesting the title to the land in controversy in himself, subject however to the payment of $300 to Arminda Carroll, (wife of the former plaintiff,) who had also managed to become a party to the suit long after it was dismissed by her husband. A more confused mass of paper (I will not dignify it with the name of a record) than is pre sented in this case, I sincerely hope I may never see in this court again. But I forbear any further comment, nor will I be at the pains to make a list of all the errors, blunders, and irregularities that this case so fully exhibits. It is sufficient to observe, that the decree rendered by the court is not in my opinion supported by the evidence adduced.

Judgment reversed and petition dismissed without prejudice. All the judges concur.

AMELIA E. LONG, Appellant, *vs.* LOUISA A. COCKRELL, ADM'R OF THE ESTATE OF W. B. COCKRELL dec'd, Respondent.

1. *Replevin against constable—Title to property—Assessment of value—Return of to defendant.*—In replevin against a constable for an unlawful seizure where defendant put in issue plaintiff's title to the property, and the jury found for the plaintiff and assessed the value of the property at a greater sum than the amount of the execution, judgment should be for the return to the constable, of the entire property, or payment to him of its entire assessed value, and not merely for that of an amount equal to the execution. In such case the presumption would be that the jury found plaintiff to have no title to the property.
2. *Replevin—Action by married woman, without joining husband—Remedy by defendant.*—In replevin against a constable where it appears that plaintiff is a married woman, and her husband is not joined, defendant can obtain no personal judgment against her. His appropriate remedy is suit against her bondsmen, under the "Claim & Delivery" act, (Wagn. Stat., p. 1027, § 19,) for failure to prosecute the suit with effect.

Appeal from Jackson Circuit Court.

Franklin & Napton, for Appellant.

I. This court held in Dilworth vs. McKelvy, 30 Mo. 149, that the statute did not contemplate the assessment of the entire value of the property, except where the defendant is the absolute owner. Where as in the case at bar, the defendant has only a special interest in the property, the jury or court should assess the value of the interest. (See also Gilham vs. Kerone, 45 Mo., 489.)

The facts disclosed by the pleadings warrant a reversal of this cause. For the defendant has a judgment against the plaintiff, for more than double the amount claimed. The verdict should have been for the amount of the constable's lien, that is, the amount of the judgment and executions, and not for the whole value of the property.

Lay & Belch, for Respondent.

I. The judgment was properly rendered for the return of the property or its full value, against the plaintiff and sureties on the bond. (Fallon vs. Manning, 35 Mo., 271; Frei vs. Vogel, 40 Mo., 149.) The cases of Dilworth vs. McKelvy, 30 Mo., 149, and Gillham vs. Kerone, 45 Mo., 487, are not in con-

flict with this view, but rather support it. The answer alleges ownership in a party, other than the plaintiff. This was one of the issues presented by the pleadings. Evidence may have been offered, and no doubt was, upon this issue, and tending to show that plaintiff is a stranger to the title. None of the evidence or instructions are preserved. This question may have been submitted to the jury by the instructions of the court, and it is to be presumed in the absence of anything to the contrary that it was.

VORIES, Judge, delivered the opinion of the court.

This action was brought by the plaintiff, in the Jackson Circuit Court in October, 1871, against the intestate of the defendant, to recover the possession of certain personal property in the petition described, and which was charged to be of the value of three hundred dollars. The petition was in the usual form. The defendant in her answer, first denied the plaintiff's right to the possession of the property, and that it was wrongfully detained from her, and then, as an additional defense, charged that plaintiff was a married woman, and was then the wife of one Southey N. Long; that defendant's intestate was a duly elected and qualified constable of Kaw township in Jackson county, on the 4th day of January, 1870; that an attachment, and several executions, all of which were particularly described, and were for the aggregate amount of $139, were placed in his hands as such constable, to be by him duly levied and executed as the law directs, and all of which were against the property of the said Southey N. Long; that by virtue of said attachment and executions the said intestate levied upon and seized said property in the petition named, as the property of said Southey N. Long, by virtue of which he held the same at the time the same was replevied out of, and taken from, his possession by virtue of the orders and process issued in this suit. It is further averred that the property was at the time legally subject to be levied on and attached as the property of said Southey N. Long.

The plaintiff filed a replication to this answer, in which she

did not deny that she was a married woman, or that defendant's intestate was constable as charged, but did deny all of the other material affirmative allegations in the answer.

A trial was afterwards had before a jury, a verdict was rendered in favor of the defendant, and the value of the property assessed at three hundred dollars, and damages found in the sum of twenty five dollars. A motion was filed for a new trial which was overruled by the court, and judgment rendered against the plaintiff and her sureties on her replevin bond for the return of the property or for the payment of the sum of three hundred dollars and damages as found by the jury.

The plaintiff appealed to this court. There is no bill of exceptions filed in this case, and not a single exception saved to any ruling of the court. The motion for a new trial is not even made a part of the record, by any bill of exceptions or otherwise. This court can therefore only look to the record to see if any error is apparent therein.

It is insisted by the plaintiff that it appears from the pleadings and judgment rendered in the cause, that the court erroneously rendered judgment against the plaintiff for the whole value of the property in controversy, when it appears from the defendant's answer that the property was only held by the defendant's intestate, by virtue of two judgments and executions and one attachment which had been delivered to him as constable, the aggregate amount of which was only claimed to be about one hundred and forty dollars; while the judgment was rendered against the plaintiff and the sureties on her bond, for either the return of the whole property or the payment of three hundred dollars together with damages for the detention of the property. It is insisted that the jury should have only assessed the value of the interest of the constable in the property, which was the amount of the executions. This position is not true in this case. It must have been found by the jury that plaintiff was not the owner of the property, and if the constable had seized the property under the executions, and it was of greater value than the amount of the executions, it would be the duty of the constable upon

a sale of the property, to have the surplus remaining after the payment of the executions ready to pay to the execution defendant on demand, and not to the plaintiff, who had no title thereto. Hence it was proper to assess the whole value of the property in his favor, and the court properly rendered judgment therefor.

There is however, an error appearing upon this record of a more serious nature. The defendant in her answer charges that the plaintiff is a married woman, and that she had a husband then living. The plaintiff in her replication fails to deny this charge, thus it stands admitted on the record, that the plaintiff is a married woman, and the answer states or points out who her husband is. And there is no pretense in this case that the plaintiff claims the property, and sues therefor in her own name, under the 14th section of the execution law in favor of married women. Our statute provides that when a married woman is a party, her husband must be joined, unless in a few excepted cases, named in the statute, the present case not being one of them, (Wagn. Stat., 1001, § 8,) yet this case is proceeded in, in the name of a married woman as plaintiff to final judgment.

It is scarcely necessary to say, that a personal or general judgment, rendered against a married woman, is erroneous if not void. (Bauer vs. Bauer, 40 Mo., 61.) In ordinary actions if it should appear by the pleadings in the cause to be admitted by the parties that the plaintiff was a married woman, it would be the duty of the court to either dismiss the action, or to have the husband of the plaintiff brought in as a party to the action under the 4th section of article 8th of the statutes of this State, (Wagn. Stat., 1034,) but in this case no personal judgment could be rendered against the plaintiff, so that the difficulty would not be remedied by bringing the husband in.

It would seem that the only appropriate remedy for the defendant in a case like this would be to dismiss the suit, and let the defendant seek her remedy under the 19th section of the statute concerning the "claim and delivery of personal

property," by action against the sureties on the bond, in consequence of the failure of the plaintiff to prosecute her suit with effect. At least, no personal judgment could be rendered against a married woman.

The judgment will be reversed, and the cause remanded The other judges concur.

BENJAMIN B. SHARP, *et al.*, Respondents, *vs.* HENRY RHIEL, *et al.*, Appellants.

1. *Parol contracts—Performance of—Stat. frauds—Year, when commences running—Part performance.*—The year, within which a contract not in writing must be performed in order to escape the bar of the statute of frauds, (Wagn. Stat., 656, § 5,) must commence from the date of the contract, and not from the date of entering upon its performance. The doctrine of part performance has no application to this provision of the statute. Performance as meant by that section is complete, and not partial, performance. (Atwood's Admr. vs. Fox, 30 Mo., 499.)

Appeal from Henry Common Pleas.

McBeth & Pierce and F. P. Wright, for Appellants, relied upon the statute of frauds, (Wagn. Stat., 656, § 5,) and Atwood's Admr. vs. Fox, 30 Mo., 499.

LaDue & Fyke, for Respondents.

I. Respondents contend, that the real time, within the meaning of the statute, when said contract was actually made and concluded, was March 1st, 1871, when they commenced hauling, and appellants commenced receiving the coal. They acted under the original understanding, and on that day (March 1st 1871,) ratified and made binding the previous understanding between the parties.

II. The respondents were wrongfully stopped in the prosecution of their business by the appellants. We say, that this state of facts presents such a case as is recognized in the law as a contract fully performed by these respondents, and that

the appellants should be made to respond in damages for the wrongful breach on their part.

ADAMS, Judge, delivered the opinion of the court.

The only point raised by this record is, whether the plaintiffs could recover on an executory contract not in writing, which was made on or about the first day of February, 1871, or several weeks before the first of March, whereby it was agreed between the parties, that the plaintiffs should furnish to the defendants all the coal they might need to run a steam flouring mill from the first of March, 1871, till the first of March, 1872. After making the contract, the defendants did, on the day named, commence delivering coal at the price agreed on, which was paid to them as they delivered it; and they continued to do so till the 25th of April, 1871, when the defendants refused to receive any more coal, although the plaintiffs were ready and willing, and offered to continue, to deliver the coal for the whole time agreed on.

During the progress of the delivery the defendants acknowledged the existence of the contract in conversations, and requested plaintiffs to open another bank of better coal, so as to deliver from the new bank, which they did. But there was no proof at all to show that there was any new contract made to carry out the original contract. The statute of frauds was set up and relied upon by the defendants in their answer as a bar to the plaintiffs' recovery.

The court gave an instruction for the plaintiffs to the effect, that if the contract could be performed within a year from the time of entering on its performance, the plaintiffs could recover. And for the defendants, the court instructed, that if the contract could not be performed within a year from the time of making it, the plaintiffs could not recover. The jury found a verdict for the plaintiffs. A motion for a new trial was made and overruled.

The plaintiffs had no standing in court. The statute of frauds was a complete bar to their recovery. The two instructions were obviously contradictory; the defendants' was

rightly given, and the plaintiffs' was wrong and should have been refused.

The statute of frauds is, that no action can be maintained on a contract not in writing, which cannot be performed within one year from the time of making it. (Wagn. Stat., 656, § 5.) There must be some note or memorandum in writing signed by the party to be charged. The time commences from the making of the contract, and not from the time the performance is to commence.

It is very manifest that a part performance has no application to this part of the statute. Unless the contract can be wholly performed within the year from the time it is made, it is covered by the statute. (Atwood's Admr. vs. Fox, 30 Mo., 499.)

Let the judgment be reversed, and the cause remanded. The other judges concur.

JOHN OTTE AND WIFE, Plaintiffs in Error, *vs.* FERDINAND BECTON, *et al.*, Defendants in Error.

1. *Estate of minors—Allowance to parents for past maintenance, when will be granted.*—A court of Chancery may make an allowance out of the estate of minors to their parents for past maintenance by the latter, where they are poor, and the infants are entitled to an estate large enough to admit of it and leave enough for their future education and support. But *semble*, that where the fund is no more than adequate for the education of the infants, such allowance will be withheld.

Error to Morgan Circuit Court.

J. A. Spurlock, for Plaintiffs in Error.

I. If a mother has maintained her infant child without the order of the court, she will be entitled to a liberal allowance or indemnity for what she has expended, without reference to the infant's fortune, though, if the court be applied to for prospective allowance, regard may be had to his fortune. (Bruin vs. Knott, 12 Simon, 436; see also 6

Ves. Jr., 454; 4 Turner, 118; Elliot vs. Lewis, 3 Edw. Chy., 40; 2 Sto. Eq., 1354–5; 5 Johns. Chy., 497; 2 Saund. Pl. & Ev., 581; Wilkes vs. Rogers, 6 Johns. Ch., 566; In matter of Bostwick, 4 Johns. [N. Y.], 100.)

W. M. Woods, for Defendants in Error.

I. Plaintiffs in error are not entitled to recover in this action, because the minors were members of the family at the time the contract of marriage was entered into by plaintiffs, and remained there without any contract for remuneration for the maintenance and services sought to be charged against them. (See Gillett vs. Camp, 27 Mo., 541; Guion vs. Guion, 16 Mo., 48.)

Adams, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery to compel the guardian of three minor children, who are made defendants, to pay plaintiffs out of their estate, in his hands, a sum of money alleged to be due for past maintenance.

The leading facts are that John Spotts, the father of said minors, died on the 8th of June, 1863, whilst he was a soldier in the United States Army, and as such entitled to a pension. His wife received the pension after his death up to 1865, when she forfeited it by marrying the plaintiff, John Otte, and the children became entitled to the pension, which amounted to about eleven hundred dollars when this suit was commenced, and is held by their guardian for them.

The widow maintained the children, who were infants, the oldest being only six years of age, up to her inter-marriage with the plaintiff, and then she and her present husband since that time. They claim that it was worth twenty one hundred dollars to maintain the children up to the bringing of this suit, and they ask a judgment ordering that amount to be paid out of the funds in hand, and out of what may accumulate, each child being entitled to eight dollars per month till they arrive at sixteen years of age. It is alleged, that the mother and step-father are poor and not able to support the children.

The law seems to be well settled, that where the father or mother, or a step-father, maintain infant children, they have no legal right to recover for past maintenance in an action at law, unless it be upon an express promise to pay the same after their arrival at years of maturity. But a court of chancery may allow it out of their estate, where the parents are poor, and the infants are entitled to estate large enough to admit of it and leave enough for their future education and maintenance. Each case must depend on its own facts. Here are three infant children to be educated out of this fund, and it is not more than sufficient for that purpose. The guardian has the right to appropriate it towards their education and future support, and he ought to do so with the approbation of the Probate Court having jurisdiction over him. We do not feel at liberty on the facts of this case to order anything to be paid to the plaintiffs. (See matter of Bostwick, 4 Johns. Ch. 100; Guion vs. Guion's, Adm'r, 16 Mo., 48; Gillett vs. Camp, 27 Mo., 541.)

The Circuit Court dismissed the plaintiffs' petition on technical grounds. But under the view we take, the plaintiffs have no merits at all; and on this ground the judgment dismissing the petition is affirmed.

The other judges concur.

HANCOCK, ROACH & CO., Plaintiffs in Error, *vs.* H. CLAY EWING, *et al.*, Defendants in Error.

1. *Penitentiary—Contracts for labor may be interfered with by act of Legislature.*—Neither the warden nor the inspectors of the State Penitentiary can make contracts for convict labor, which will preclude the Legislature from adopting another system necessarily interfering with the execution of such contracts. If parties contracting with the State thereby sustain loss, they undoubtedly have a claim against the State, but such as it is not in the province of the courts to allow.

Error to Cole Circuit Court.

Lay & Belch, for Plaintiffs in Error.

I. The act of March, 1873, authorizing the leasing of the penitentiary, refers to the contract of plaintiffs and others of the same kind in direct terms, and gives sixty days in which the contractors are to wind up their business and turn it over to the lessees. There can be no doubt, but that the effect of this act, if carried out, is to impair the obligations of their contract, and that it was so intended by the Legislature. In so far as it does this, we submit that it is in violation both of the constitution of the United States and of this State, and is void as to these plaintiffs. (Article 1, § 10, Constitution of U. S., Wagn. Stat., p. 23; Art. 1, § 28, Constitution of Mo., Wagn. Stat., p. 37.) And there is no question, whatever, but these provisions apply to contracts between the State and individuals. (Cooley's Constitutional Limitations, side pages 127, 274, 275, and authorities cited.)

J. L. Smith & H. Clay Ewing, Att'y Gen'l, for Defendants in Error.

I. The second ground of objection contained in the demurrer to the petition is fatal. A contract is *defined* to be contrary to public policy in the sense of the law, where it is injurious to, or subversive of, the public interest. Such contracts are classed under the head of constructive frauds. (II Bouvier Law Dict., 349; Story Eq., § 260; Christopher vs. Janssen, 1 Atk., 352.)

It is insisted that the contract set forth in plaintiff's petition is injurious to, and subversive of, the public interest. It is a constructive fraud on the State.

The history of the State Penitentiary, as detailed in the various journals and enactments of the State Legislature, shows conclusively, that this institution, conducted and operated by the officers and agents of the State for the last few years, has furnished one of the largest items in the current expenses of the State. The expense of its maintenance has so rapidly increased within the last decade that it has become a source of just alarm, and has provoked a series of legislative investigations, resulting in the developments of peculation, venalty and fraud upon the public. (See Acts 1873–4.)

Can it be truthfully asserted, that the warden and inspector could lease the work-shops and hire out all the skilled convict labor in the penitentiary for a period of six years from January 15, 1872, and thereby exclude the State from any control or disposition thereof until the expiration of said period, and that such contracts were not injurious to, and subversive of, the public interests? Does not such contract operate as a constructive fraud upon the State?

It must be considered, that the Legislature has the right and power to change the manner of penal servitude. The State has the right, through its Legislature, to abolish altogether, as a penalty for violated law, imprisonment with hard labor. It might choose to make the penalty simple imprisonment without labor, or labor half the time, or substitute solitary imprisonment alone for the present system. Indeed, the right of the State to change its system altogether, and adopt any other the wisdom of the Legislature may suggest, must be unquestioned.

We insist, then, that the proper basis, upon which to decide this case, is squarely upon the question of public policy.

NAPTON, Judge, delivered the opinion of the court.

This was an application for an injunction against the defendants, who are inspectors, *ex officio*, of the penitentiary, and who, by virtue of an act of the Legislature, passed March 22, 1873, entitled "an act to lease the State Penitentiary for a period of ten years," were about to lease the same, on the ground that plaintiffs had a contract with a former warden for the hire of a certain number of convicts for five years, and the term had not expired. To this petition there was a demurrer, and the demurrer was sustained, and this involves the only question in the case.

The question is, whether the warden of the penitentiary or the supervisors, called inspectors, or both, can make contracts for convict labor which will preclude the Legislature from adopting another system necessarily interfering with the execution of such contracts, and we are clearly of the opinion

that this could not be done. Such contracts, it may be conceded, are warranted by the law, and seem in various instances to have been made and sanctioned by the Legislature, but all such contracts must necessarily imply a right on the part of the Legislature to change its policy in regard to the penal system. This is a necessary result of the peculiar character of such contracts. It may be that the Legislature will abolish the whole system and require solitary confinement without labor, as we know is the policy of some States, or it may happen that the number of convicts will not enable the warden to furnish the contractors with the number called for in the contract. Or it may be, as was the case here, that the management is taken from the State officials and the penitentiary leased, and the parties to such contracts must be presumed to know that such changes of policy may occur.

Whether the warden and inspectors under the old law could make contracts exceeding the time in which their official terms expired, is not material. That they did so in repeated instances, may be conceded, and that the Legislature sanctioned such contracts may also be conceded, but in this case the Legislature declined to do so, and adopted a new system, which they had undoubted power to do. If the plaintiffs by this sustained a loss, they undoubtedly have a claim against the State; but such a claim it is not in the province of the courts to allow, much less can the courts interfere by injunction to prevent the execution of the law.

Judgment affirmed. The other judges concur; Judges Wagner and Sherwood absent.

AUSBY FIKE, Defendant in Error, *vs.* GEO. M. CLARK, Plaintiff in Error.

1. *Practice, civil—Instructions—Evidence.*—Instructions having no evidence on which to base them should not be given.
2. *Limitations, statute of—Absence of defendant from State—Const. Stat.*—The exception in the statute of limitations, which prevents time from being a bar on account of the absence of the defendant from the State, (Wagn. Stat., 919, § 16,) only applies to those who were residents of the State at the time the cause of action accrued.

Error to Bates Circuit Court.

Page & Holcomb, for Plaintiff in Error, relied on Thomas vs. Black, 22 Mo., 330.

S. A. Riggs, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action originally commenced April, 15th, 1871, before a justice of the peace, on a promissory note for $32.91 due one day after date, and dated January 2nd, 1860, executed by defendant to plaintiff. There was a credit on the note for $8.00 dated April 2nd, 1860. Defendant pleaded the statute of limitations, but plaintiff had judgment. Defendant appealed to the Circuit Court, and there renewed his plea of the statute, though without avail, as the court on trial anew again gave judgment for the plaintiff.

On the trial it appeared, that at the date of the execution of the note both parties resided in or near Mascoutah in the State of Illinois; that defendant left there in the night time, and emigrated to the State of Kansas, in the year 1861, and has ever since that time resided in that State, except that during the years 1867 and 1868 he resided in Bates county, Missouri; that during the year 1864 he went back to Mascoutah, Illinois, and while there saw the plaintiff, who since the year 1866 has been a resident of Henry county in this State. There was no evidence tending to show that defendant has concealed, or attempted to conceal himself, or that plaintiff was unaware, from the time the note became due until said suit

brought, of the whereabouts and place of residence of the defendant.

Under this state of facts the declarations of law given at the instance and on behalf of the plaintiff, to the effect that concealment, or other improper act of the defendant, would prevent the statute of limitations from running, were manifestly improper and should have been refused, as having no evidence whereon to base them.

The defendant was refused declarations of law to the effect, that on the facts as proven the statutory bar had attached in the present case, and that the exception in the statute of limitations, which prevented time from being a bar on account of the absence of the defendant from this State, only applied to those who were residents of the State at the time the cause of action accrued. This position of the defendant was undoubtedly correct and clearly applicable to the evidence adduced. Wagn. Stat., 919, § 16, which is a literal transcript of R. C. 1855, p. 1049, § 12, and R. C., 1845, p. 717, § 7, is confined exclusively to that class of persons therein enumerated, *i. e.* residents of this State when the cause of action accrues. The section referred to has received judicial construction and it is therefore no longer a mooted question. (Thomas vs. Black, 22 Mo., 330.)

Judgment reversed. All the judges concur.

THOMAS SMITH, ADM'R, Respondent, *vs.* WILLIAM MONKS, Appellant.

1. *Appeals from justice—Irregularity of proceedings—When too late to object to.*—When a party appears voluntarily in a cause and goes to trial, waives a jury, and submits the cause to the court for hearing, it is afterwards too late for him to object for the first time to the regularity of the previous proceedings.
2. *Administrators, suit by—Descriptio personæ.*—Where a note was given to an administrator in his representative capacity merely as a description, suit may be properly brought by him in his individual capacity.
3. *Justice of the peace—Statement—Consideration.*—A statement filed with a justice need not specifically set forth the consideration upon which a note sued on is founded.

Appeal from Webster Circuit Court.

Waddell, Monks and Flanagan, for Appellant.

Ewing & Smith, and Bray & Mitchell, and Pope & Miller, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This case purports to have been brought before a justice of the peace of Howell county, and from there appealed to the Circuit Court of said county; from which court the cause was removed by change of venue to the Circuit Court of Ozark county, and from which last named court the venue was again changed and the case removed to the Circuit Court of Webster county, where the cause was tried and a judgment rendered in favor of the plaintiff; from which the defendant has appealed to this court. The cause was tried by the court, a jury having been waived by the parties. No instructions or declarations of law were asked by either party, or given by the court, and although the record is quite long and as irregular as it is possible to make one, yet not a single exception of law was made or saved by either party in the whole record, other than the exceptions taking to the overruling of the defendant's motions for a new trial and in arrest of the judgment.

The grounds set forth in these motions, for the interference of the court, were, first, that the several changes of venue were improperly taken; second, that the suit was brought on an instrument given to plaintiff as administrator, while the suit was brought by him in his individual capacity; third, that the instrument, upon which the suit was brought, did not purport to have been given for a valuable consideration; fourth, the record was not properly certified to the court trying the cause so as to give the court jurisdiction of the case. It is insisted by the defendant, that the court trying the cause had no jurisdiction of the case; that there is nothing in the record showing that an appeal was properly taken from the judgment of the justice, and that there was no properly certified

transcript of the proceedings in the Circuit Court, or in the different courts, to show that the cause was properly transferred from court to court by change of venue. It is true, that the record fails to show the judgment before the justice, and the appeal from the justice's judgment to the Circuit Court; and it is also true, that the two changes of venue taken in the cause were not very regularly taken, and it is not shown that the proceedings in one court were properly certified from such court to the other. But the answer to all this is, that the defendant appeared in the different courts making no objection to the proceedings already had, and in the Webster Circuit Court the defendant appeared voluntarily, made an agreement to go to trial, and allowed a copy of the instrument sued on (and which had not been sent to said court with the papers) to be read in evidence on the trial, and then went to trial by agreement, and waived a trial by jury, submitting the case to the court for hearing. After this it was too late to object for the first time to the regularity of the previous proceedings. The suit was properly brought in the name of the plaintiff in his individual capacity; he was only called administrator as a description of his person, and to show what costs, or expenses, were intended by the instrument sued on.

It is next complained, that the instrument sued on did not purport to have been given for a valuable consideration, and, therefore, no cause of action was shown against the defendant. This suit was brought before a justice of the peace where no technical pleadings are required, and no special averments were necessary. A statement was filed showing the cause of action, which statement was filed with the instrument sued on. The instrument sued on was as follows:

"West Plaine, Mo., August 5th, 1867. We, or either of us, promise to pay to Thomas Smith, administrator of the estate of Benjamin F. Hawkins, the full amount of all the expenses legally incurred in said administration, on or before 3rd Monday in October, A. D. 1867." This instrument was signed by defendant and another.

The statement filed as the cause of action with this

instrument, after setting forth the instrument, set forth the items and amount of the expenses legally incurred in the administration of said estate of said Hawkins, and then avered that defendant, though requested so to do, had failed and refused to pay the same, and prayed judgment for said amount. On the trial the plaintiff, without objection from defendant, introduced evidence tending to prove that plaintiff, as administrator of the estate of Hawkins, had sold part of the property belonging to said estate to the defendant; that the defendant had the control of a demand which had been proved up against said estate, and desired to have the price to be paid for the property purchased credited on said demand against said estate; and that plaintiff objected and demanded the money for the property sold, stating that he wanted the money so that he could retain the expenses of administration out of the money; whereupon defendant agreed to pay plaintiff his expenses of administration, provided plaintiff would let defendant apply the entire price to be paid for the property purchased on the demand which he had against the estate, which was the only debt against the estate besides the amount due plaintiff for the expense of administration; that plaintiff permitted defendant to retain the whole price to be paid by defendant for the property purchased by him, and to credit the same on his demand, and made final settlement of the estate without receiving his costs and expenses of administration; that at the making of this arrangement, the defendant in consideration thereof executed and delivered to plaintiff the instrument sued on. This was a good consideration for the promise, and although the statement filed did not specifically set forth the consideration, yet it was sufficient before a justice of the peace.

The defendant presented an account for services performed as an attorney, and a set-off. The record does not show where or when the set-off was filed, yet evidence was adduced to prove and to disprove the same. The evidence was conflicting on the set-off, as well as on the plaintiff's demand; and the bill of exceptions does not even pretend that all of the evidence is pre-

served or set forth therein on either side. Under such circumstances, the court having found the facts for the plaintiff, this court cannot interfere with the finding, no sufficient errors having been shown to authorize this court to reverse the judgment of the Circuit Court.

The judgment is therefore affirmed; the other judges concur.

A. M. JULIAN, *et al.*, Defendants in Error, *vs.* E. H. BOREN, *et al.*, Plaintiffs in Error.

1. *Sheriff's deed—Recitals in—What will not pass title.*—A sheriff's deed recited a judgment and execution against A. and B., and levy of the same upon their interest in certain described land, and the sale on a day named of all the interest in said land of A., B. and C. It then proceeded to convey to the vendee at the sale all the title of A., B. and C, which the sheriff might sell by virtue of the execution. *Held*, that the sheriff's deed did not pass the title of C. to any land.

Error to Greene Circuit Court.

McAfee & Phelps, for Plaintiffs in Error.

J. P. Ellis, for Defendants in Error.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment, brought by the defendants in error, against the plaintiffs in error, to recover the possession of the north half of lot No. 40 in Kimbaugh's second addition to the city of Springfield, Greene County, Missouri. The petition is in the usual form. The answer of the defendants simply denied the allegations of the petition. A trial was had before the court, a jury having been waived by the parties. Upon the trial it was admitted by the parties, that both parties claimed title to the premises in controversy under and through Nicholas F. Jones and George M. Jones as a common source of title. The only evidence offered by the plaintiffs was a deed from George M. Jones to the plaintiffs,

dated the 28th day of June, 1867, which, it was admitted by the defendants, was sufficient in form to convey the title to the lot to plaintiffs. The defendants then read in evidence a deed executed by one Thomas A. Reed, as sheriff of Greene County, purporting to convey the premises in controversy to Deborah Anderson. In this deed it was recited, that on the 28th day of May, 1862, an attachment was issued from the Clerk's office of Greene County, in favor of William J. McDaniel and against Nicholas F. Jones, George M. Jones and James S. Jones; that on the 14th day of July, 1862, it was levied on the premises in controversy as the property of said defendants; that on the 5th day of December, 1862, a judgment was rendered in the Greene Circuit Court in favor of William J. McDaniel and against Nicholas F. Jones, George M. Jones, and James S. Jones for the sum of $299 debt, and $54 93-100 for damages, upon which judgment execution issued from the clerk's office on the 2nd day of January, 1863, and which was, on said day, delivered to the said sheriff. Said deed then proceeded further to recite as follows: "Whereas, on the sixth day of February, in the year of our Lord, one thousand eight hundred and sixty-one, a judgment was rendered in the Circuit Court of the County of Greene, in favor of Mercer Moody and against Nicholas F. Jones and James S. Jones, for the sum of fourteen hundred and thirteen and 61-100 dollars for debt and —— dollars for damages, upon which judgment an *alias* execution issued from the clerk's office of said Court in favor of said Mercer Moody and against the said James S. Jones and Nicholas F. Jones, dated the second day of January, 1863, directed to the sheriff of the county of Greene, and the same was to him delivered on the second day of January, 1863, by virtue of which said execution, I, the said sheriff, did on the sixth day of January, 1863, levy upon and seize all the right, title, interest and estate of the said Nicholas F. Jones and James S. Jones in and to the following described real estate, situate in my said county, to-wit: north half of lot No. (1) one, in Kimbaugh's second addition to the City of Springfield, Greene County, State of Missouri; and having, previously to the day of sale hereinafter mentioned,

given at least twenty days' notice of the time and place of sale and of the real estate to be sold and where situate, as the law directs, by advertisement in the "Springfield Missourian," a newspaper printed in my said county, by virtue of which said execution and notice I did, on the 29th day of January, 1863, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day, agreeable to said notice, at the court house door in my said county of Greene, during the session of the Circuit Court of my said county at the January term thereof, for the year one thousand, eight hundred and sixty-three, expose to sale at public auction for ready money all the right, title, interest and estate of the said Nicholas F. Jones, and George M. Jones of and to the above described real estate; and Deborah A. Anderson being the highest and best bidder for said real estate at the price and sum of four hundred and twenty-three dollars, the same was stricken off and sold to the said Deborah A. Anderson for that sum."

The sheriff's deed then proceeds to convey all of the right, title and interest of the said Nicholas F. Jones, James S. Jones and George M. Jones, that he might sell as sheriff aforesaid, by virtue of the aforesaid execution and notice.

The defendants then read in evidence a deed from D. A. Anderson to James Vaughn, dated April 20th, 1863, and a deed from James Vaughn to defendants, dated April 30th, 1864, each of said deeds conveying the property sued for, and which said deeds, it is admitted, are in due form and properly acknowledged. This closed the evidence on the part of the defendants.

The plaintiffs then, to rebut the evidence of the defendants, and destroy the force thereof, read in evidence a transcript of the judgment and proceedings in the cause of William J. McDaniel vs. N. F., Geo. M., and James S. Jones, upon which judgment and proceedings, it is said, the said sheriff's deed read in evidence is based. By this transcript it appears, that Wm. J. McDaniel filed a petition in the Greene Circuit Court against Nicholas, James S., and George M. Jones; that, on the 23d day of July, 1861, an affidavit and bond were

made in the cause for an attachment against the defendants, Nicholas F. and George M. Jones; that an attachment was issued against all three of the defendants, bearing date the 28th day of May, 1862; that on the 12th day of June, 1862, said attachment was levied on a large amount of property as the property of the defendants; that, on the 14th day of July, 1862, the attachment was levied on the property in controversy as the property of George M. and Nicholas F. Jones, and a further return on the attachment, that none of the defendants could be found; that an order of publication was made and published against all of the defendants; that, on the 5th day of December, 1862, a judgment was rendered against all of the defendants for the sum of $299 66-100 debt, and fifty-four 93-100 dollars damages, and costs, and ordering the property attached to be sold to pay the judgment, among which was the property in controversy; that, on the 2nd day of January, 1863, a special execution was issued on said judgment for the sale of the property named therein.

The sheriff's return on this execution is as follows: "And on the 29th day of January, 1863, sold lot No. 1. of Kimbaugh's 1st addition to William J. McDaniel, at the court house door, for three hundred and sixty-two dollars, and the balance was received on sale of lot No. 1, Kimbaugh's 2nd addition in City of Springfield, which satisfies the within execution and costs, this January 29th, 1863."

This was all of the evidence in the case. After the close of the evidence the court, at the request of the plaintiff, amongst other declarations of law, declared the law to be, "that in an attachment suit, the affidavit is an element of jurisdiction and the necessary and indispensable pre-requisite to the issuance of the writ of attachment, and to the issuance of an order of publication and, until such affidavit has been filed, no jurisdiction can be acquired in the cause, although a writ of attachment be issued and levied on property, and although publication be actually made, the writ of publication in such case and all proceedings thereunder are *coram non judice* and void."

The defendants objected to this declaration of law and excepted. The court then refused the following declaration of law, asked for by defendants, and the defendants again excepted:

"That the deed of sheriff Reed to Anderson, read in evidence by defendant, passed all the right, title and interest of George M. Jones in and to the property sued for to said Anderson, unless it has been shown that the judgment and proceedings upon which said deed is based are absolutely void."

Judgment was rendered by the court in favor of the plaintiffs for one undivided half of the premises in controversy.

The defendants filed a motion for a new trial, on the grounds, that the court had made improper declarations of law at the request of the plaintiffs, and refused proper declarations of law asked for by the defendants; and because from the evidence the defendants were and are entitled to a judgment in their favor. This motion being overruled, the defendants again excepted, and have brought the case here by writ of error. The questions necessary to be considered in this case do not necessarily involve all of the questions so ably argued before this court by the attorney for the plaintiffs in error. The declaration of law asked for by the defendants and refused by the court, as above set forth, involves the only question necessary, in my judgment, to be inquired into in the investigation of the case. Does the sheriff's deed, read in evidence, have the effect to convey the title of George M. Jones to the property in controversy to Deborah A. Anderson? To settle this question it is not necessary to decide whether the judgment rendered in the attachment suit of William J. McDaniel against Nicholas F. Jones, George M. Jones and James S. Jones was void or not. It does not appear from the whole record in the case, that any sale of the lot in question was ever made under or by virtue of any execution issued on said judgment, either to said Anderson or to any one else. The sale made to Anderson, it clearly appears from the sheriff's deed and the recitals therein, was made under and by virtue of an execution issued on a judgment rendered by the Greene

Circuit Court in favor of one Mercer Moody and against Nicholas F. Jones and James S. Jones; this judgment, it appears by the recitals in the sheriff's deed, was rendered on the 6th day of February, 1861, and it is recited in the sheriff's deed, that an *alias* execution issued on the judgment in favor of Moody on the 2nd day of January, 1863, which was delivered to the sheriff on said day, and that, by virtue of that execution, he levied on all the right, title, interest and estate of the said Nicholas F. Jones and James S. Jones in and to the property in controversy; and it is also recited, that it was by virtue of this execution and levy that he advertised and sold the property in controversy to Anderson, and that he sold him all of the right of the defendants which he might sell by virtue of said execution and levy. It is true, that in the conveying part of the deed he attempts to convey the title of George M. Jones as well as that of James and Nicholas Jones, but the judgment was not against George M. Jones, the execution was not against him, and the property levied on was not levied on as his property, but only as the property of the defendants in the execution, and, of course, no other interest could be sold or conveyed by virtue of said levy and sale.

There is no pretense that it is shown by the recitals in the sheriff's deed, that any sale of the lot in controversy was ever made or attempted by virtue of any execution issued in the attachment suit of McDaniel. It is recited in the commencement of the deed, that a judgment was recovered in said suit and an execution issued; it is not recited whether it was a general or special execution, nor is it shown that any action was ever taken under it of any nature whatever; but it is shown, that the lot was sold by virtue of the execution in favor of Moody, to which George M. Jones was no party. His title could not therefore have passed by the sheriff's deed. The court, thereupon, properly refused to declare the law to be, that the sheriff's deed, read in evidence, passed the title of George M. Jones to said Anderson. Whether an affidavit was necessary and indispensably requisite to the issuance of the attachment in the suit brought by McDaniel, or whether the court would get jurisdiction over

the property attached where no affidavit was made in the cause, are questions not necessary for this court to decide.

The declaration of law on that subject had no evidence upon which it could be predicated, as it was not shown, that any sale had been made by virtue of any process in the cause to which it referred. It was, therefore, a mere abstraction, so far as this case is concerned, and the question involved therein will not be discussed here; but as it clearly appears that the defendants have failed to show that they have received or acquired any title from George Jones, and as it is admitted that he was a part owner of the lot in controversy, it follows that the court properly rendered a judgment in favor of plaintiff for one undivided half of the property sued for.

With the concurrence of the other judges, the judgment of the Greene Circuit Court is affirmed. Judge Sherwood did not sit.

JOHN. G. PUTNAM AND T. P. STEVENS, Respondents, *vs.* DANIEL M. ROSS, *et al.*, Appellants.

1. *Mechanic's lien—Contractors—Partnership— Non-joinder—Notice—What sufficient.*—Where a firm contracts to build a house, and suit is brought under the mechanic's lien law, both members need not be joined as defendants; either may be sued alone.

In such case, a notice of plaintiff's claim is not rendered insufficient from the fact that it alleges the demand to be against both members of the firm, and not merely against the one made defendant. (Putnam vs. Ross, 46 Mo., 337.)

Appeal from Jackson Circuit Court.

Twiss & Medsker, for Appellants.

I. The notice of a demand due from Messrs Ross & Shane, contractors, is not sufficient upon a petition alleging that D. M. Ross, was the contractor, and that the demand was due plaintiffs from D. M. Ross, particularly when the record shows that the firm of Ross & Shane, and not the individual D. M. Ross, were the contractors.

II. The original contractors are proper and necessary parties to an action to enforce a mechanic's lien. (Horstkotte vs. Menier, 50 Mo., 158.)

III. The owner of the property, against which a lien is sought, has a right to the benefit of a personal judgment against his original contracting party, whether individual or co-partners. There is precisely the same reason for making every one of the co-contractors defendants, that there is for making any one of them defendant. The owner of the building cannot be remitted to the option of the plaintiff for determination as to whether he will have personal judgment against one, or all, of his co-contractors. (Horstkotte vs. Menier, 50 Mo., 158.)

IV. The fact that Ross & Shane dissolved partnership, after a large portion of the lumber sued for was bought, or the contract completed, does not affect or defeat the necessity of making Shane a defendant.

Cravens & Tomlinson, and Ewing & Smith, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action to enforce a mechanic's lien. The plaintiffs furnished lumber to the defendant, Daniel M. Ross, as contractor, to build a house for the defendants Medsker and others, owners of the property.

The defendant Ross, and one Shane, were the contractors, as partners, for building the house. This partnership was dissolved during the time the house was being erected, and the defendant, Ross, took this job to finish on his own account, with the consent of the owners. Part of the lumber was furnished by the plaintiffs to the firm of Ross & Shane, and the remainder to the defendant, Ross, alone, after the dissolution.

The defendants objected, by way of answer, that Shane, one of the original contractors, was not joined as defendant, but did not ask that he should be brought before the court as a party. On the trial the defendants objected to the no-

tice of plaintiffs' claim, because the notice showed the plaintiffs' demand to be against Ross & Shane, and not against Ross alone. This objection was overruled. The plaintiffs obtained a judgment against Ross, and for the enforcement of the same against the property in dispute.

1. The contract by Ross & Shane to build the house was joint and several, and the plaintiffs had the right to sue Ross alone for the whole amount. As they had furnished part of the lumber to Ross & Shane, and the balance to Ross alone, and filed only one lien for the whole amount, they could only maintain one suit for the enforcement of the lien. I do not see how Shane could be joined as defendant, as he was not liable for that part of the lumber furnished to Ross after the dissolution of the partnership. The law requires the original contractor to be made a defendant. But where there are several joined in the contract, one may be sued alone, and so one may be brought before the court in a suit on the lien. If the owners of the property desire the other joint contractors to be made defendants, the court may in its discretion have them brought in as defendants if they are within its jurisdiction. There is nothing in this case to show that Shane ought to have been brought before the court. The doctrines maintained in Horstkotte vs. Menier, 50 Mo., 158, do not conflict with these views. That case holds that the original contractor should be made a defendant, but there is no intimation that, where there is a joint contract, it is necessary to bring in all the contractors.

2. The notice of the claim was sufficient. The objection was merely formal and not substantial. This notice was held to be sufficient when this case was formerly before this court. (See Putnam vs. Ross, 46 Mo., 337.)

Let the judgment be affirmed. The other judges concur.

PETER IMLER, Respondent, *vs.* CITY OF SPRINGFIELD, Appellant.

1. *Damages—Street grading—Measure of liabilities of cities.*—Where a street is graded and constructed wholly for the use of the public, no right of action accrues to persons having property fronting on the street improved, in consequence of resulting injuries, unless the injury can be shown to have been caused by the negligent or improper manner in which the work is done by the city or its employees.
2. *Damages—Grading of streets—Surface water—Injuries to adjoining property by reason of.*—City authorities are not liable for damages caused merely by reason of failure to so grade a public street as to prevent surface water from flowing upon the lots of the adjoining proprietors. But *semble* that the rule does not embrace cases where the municipality fills up or dams back a stream of running water with defined banks.

Appeal from Greene Circuit Court.

Crawford & Cravens, for Appellant, cited in argument Turner vs. Dartmouth, 13 Allen 291; 3 Kent, 452; Gale & Wh. Eas., 182; Gannon vs. Hargadon, 10 Allen 106; Franklin vs. Fisk, 13 Allen, 211; Flagg vs. Worcester, 13 Gray, 601; Goodale vs. Tuttle, 29 N. Y., 459.

John P. Ellis for Respondent, cited among others the following authorities: Mayor vs. Furze, 3 Hill, 612; Wilson vs. Mayor of New York, 1 Denio, 595; Mills vs. City of Brooklyn, 32 N. Y., 489; Dil. Mun. Corp., § 802; Rose vs. City of St. Charles, 49 Mo., 510; Brine vs. Railway Co., 110 Eng. Com. L., 402; Sprague vs. Worcester, 13 Gray, 193; Perry vs. Worcester, 6 Gray, 544; Proprietors of Locks vs. Lowell, 7 Gray, 223; Flagg v. Worcester, 13 Gray, 601; Barton vs. Syracuse, 36 N. Y., 54; Conrad vs. Ithaca, 16 N. Y., 158; City Council vs. Gilmer, 33 Ala., 116; Cotes vs. Davenport, 9 Iowa, 287.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the Greene Circuit Court, to recover damages from the defendant for having so carelessly improved and obstructed its streets, as to cause the water to flow into plaintiff's cellar, by which he was damaged.

The petition contained two counts, but inasmuch as judgment was rendered in favor of the defendant on the second

count, from which no appeal has been made, it need not be noticed by this court.

The first count in the petition, after stating that the defendant is a municipal corporation, authorized by its charter to pass ordinances to open, alter, widen, vacate, grade and pave its streets and sidewalks, and improve the same, and to drain and keep the same clean; and to build sewers on or in said streets and alleys and to repair and keep the same clean; and that the defendant by its character had the exclusive control of all streets avenues, lanes and alleys, proceeds to aver that on or about the third day of May, 1870, the plaintiff was the owner and in the possession of a lot on Booneville street, in said city, with a brick store house situate thereon, and which fronted on said street, in which said house, plaintiff was engaged in the business of selling merchandize; that the defendant on or about the first day of May, 1870, and subsequently thereto, wrongfully and negligently obstructed said street and highway in front of said business house of plaintiff, by placing stone, gravel and earth in the same, by which the drain or gutter in which the surface water, falling and flowing on said street, was carried off from said street, was filled up and destroyed; so that the surface water falling and flowing on said street, was by such wrongful and negligent act of the defendant, carried and flowed into the cellar in plaintiff's said house; by which, said house and the goods in the cellar thereof, were injured and damaged, and plaintiff's business delayed and injured; by all of which plaintiff avers that he is damaged in the sum of one thousand dollars, for which judgment is prayed.

To this count in the plaintiff's petition, the defendant in its answer thereto denies that it is by its charter authorized, empowered or required to drain the streets of said city, or to build sewers, or to keep the same clean and in repair, except so far as may be necessary for the well being of said streets. It denies that at the time charged, or at any time, it wrongfully or negligently obstructed said Boonville street, in front of plaintiff's premises as charged; and denies that it obstructed said Boonville street in front of plaintiff's premises, either carelessly or unlawfully.

The defendant then as a further answer to said first count, states that on the nineteenth day of October, 1869, it by the City Council passed an ordinance entitled, "An ordinance changing the established grade of Boonville street north of the bridge," approved October 19th, 1869, and numbered Ordinance 59, by which ordinance the then established grade of said street was changed, whereby said street was to be raised in front of plaintiff's said house, and that afterwards on the 1st day of May, 1870, and for divers days afterwards, in pursuance of said ordinance and for the purpose aforesaid, and none other, said defendant did under the supervision of its City Engineer deposit the stone, earth and gravel in said count complained of against it, and, without this, said street was by defendants in nowise obstructed, nor was any supposed gutter, channel or drain in any manner injured or destroyed; and it denies that any such deposit as is charged in said count was wrongfully, negligently, or carelessly made, or that plaintiff was injured or damaged by any wrongful act of defendant in the premises.

To the affirmative part of this answer, the plaintiff replied, denying the passage of the ordinance set forth in the answer, or that the work named in the answer was done under the supervision of the City Engineer, and also puts in issue the other facts stated in the answer.

Motions were filed by the respective parties to strike out part of the answer and replication, but as no point is made on the action of the court in reference thereto, they need not be noticed here.

A jury was waived by the parties and a trial of the cause had before the court. It appears by the evidence in the cause, that Boonville street in the City of Springfield, where the same passes in front of the plaintiff's lot and house, is situate on rather low wet ground at the foot of a hill or rising land, which rises from the opposite side of the street, from where plaintiff's house is situated, and perhaps in other directions; that the surface water falling upon these elevated lands, and which would be produced by the melting of snow falling

thereon, would naturally flow down upon the street and along the street, and along low places in the immediate vicinity of the plaintiff's house; that there was a small ditch or gully along the side of the street on which plaintiff's house was situate, along which the surface water was drained off and prevented from accumulating around the plaintiff's house and premises, but that a large quantity of the surface water usually ran and accumulated in said street; the same being rather lower in the center than at the edges of the street. This water softened the ground and made the street a muddy and inconvenient highway. It appears that in the month of May, 1870, the city in pursuance of an ordinance passed for said purpose, commenced raising the grade of said street in front of, and continuing on each side of plaintiff's house; that six or eight months intervened between the commencement of this work, and the time it was finished and macadamized; that while the workmen were placing the gravel, stone and earth upon the street, they placed the small stones which were mixed with the earth so deposited on the street, along each edge of the street, so as to be convenient to be used in macadamizing the street after the grading was finished; that in doing this work the small drain along the side of the street, by and through which the surface water was withdrawn from the low ground along the side of the street where plaintiff's house was situated, became filled up so that the water could not pass through it; that while this work was being performed and before it was completed, two unusually heavy rains fell upon the grounds around, and in the vicinity of plaintiff's house; that the surface water was caused to flow over the elevated ground, or some of it ran from the hill across Boonville street, and other waters accumulated from other directions around the property of plaintiff and other adjoining proprietors; that the water ran around the house of the plaintiff, percolated through the cellar wall and filled his cellar some two or three feet deep and injured his goods to the amount of about two hundred dollars. It was also shown that this water would probably have escaped from plaintiff's premises and left him un-

injured, if the little ditch along the side of the street had remained open.

The evidence also tended to show, that plaintiff after the first rain which injured his cellar, had notified the city authorities of the fact, and demanded pay for the damages, and that there was some talk between the plaintiff and the street commissioner in reference to raising the sidewalk in front of plaintiff's store, but that nothing was done until some month or two afterwards, when the street was macadamized, and gutters were placed along the sidewalk on each side of the street in the usual way, by which the surface water falling, and running upon the street, is carried off and no further injury apprehended. One witness also testified that if the earth along the edges of the street had been kept the highest, so as to confine the surface water falling on the street, and that coming on the street from the elevated ground in the centre of the street, the damage would not have happened to plaintiff, and he gave it as his opinion that that would have been the proper way to perform the work. On the part of the defendant the engineer in charge of the work, testified that the work was performed under his direction that he understood the business of an engineer, and that the work was properly performed and completed as soon as it was safe to do it, as the made earth or fill in the street ought to have time to settle, before the macadam was placed on it. The evidence also tended to show that the plaintiff might by a very trifling expense of less than ten dollars, have protected his house from injury by throwing some three or four wagon loads of earth around the wall of his house, so as to elevate the ground around it. This is substantially the evidence in the case.

Sixteen declarations of law were asked by the plaintiff, and seven by the defendant, some of which were given and some refused; but it will onlybe necessary to notice one of the instructions given on the part of the plaintiff in order to dispose of this case. That instruction is as follows:

1st. The court declares the law to be, that if defendant could by the exercise of ordinary care and skill in the

grading of Boonville street, have so done such work as not to cause the water flowing on such street to be forced or flowed into plaintiff's premises in his petition mentioned, whereby plaintiff was damaged, it was defendant's duty so to do, even at a reasonable expense to defendant; and if through carelessness and a want of ordinary caution or skill, or prudence and foresight in defendant, or her agents, or contractors, or employees in the execution of such work, defendant omitted, failed, refused or neglected to do so, she is liable to plaintiff for all damages sustained in consequence thereof."

The defendant excepted to the ruling of the court in giving this instruction.

The court found for the plaintiff and rendered a judgment in his favor for two hundred and twenty-five dollars.

The defendant filed motions for a new trial, and in arrest of judgment, setting forth all of the usual grounds for such motions, including the rulings of the court before excepted to. These motions being severally overruled the defendant made its several exceptions and has appealed to this court.

It is not denied by the defendant in this case, that municipal corporations are responsible for the negligence of their servants and agents who are employed by the corporation in the discharge of the duties authorized or imposed on them by law, whenever a proper case arises.

It is admitted that it is the duty of the authorities of a city, to keep the streets and highways therein, in a good and reasonably safe condition for the use of the public, and those who may travel thereon, and if they are constructed in an improper or unsafe manner or negligently left out of repair, and in a dangerous condition, and persons are injured thereby without their own fault, the corporation is liable to the person injured for the damages sustained. Corporations are also liable where the municipality engage in works of private utility to the corporation, which are not solely for the public use, where, by such works, private rights are invaded, or private property injured.

They are also liable for injuries resulting from the careless

or insufficient manner in which they construct sewers or other works of the kind, and from the negligent and insufficient manner of their construction, or for carelessly and negligently permitting them to remain out of repair, by which damage is done to individuals or their property.

It is, however, contended by the defendant, that the plaintiff's case, as made by his petition and evidence, does not come within any of these predicaments, or within any predicament out of which a liability on the part of the defendant arises.

The action in this case is brought to recover damages for an injury done to plaintiff's house and goods, consequent on the negligence of the agents and servants of defendant in grading a public street, which was being graded and constructed wholly for the use of the public. In such case, no right of action accrues to persons having property fronting on the street improved, unless the injury can be shown to have resulted from the negligent or improper manner in which the work is done by the city or its employees. This has been the settled doctrine of this State ever since the case of The City of St. Louis vs. Gurno (12 Mo., 414) was decided; the same doctrine being re-affirmed in the case of Schattner vs. Kansas City, decided at the last July term of this court. (53 Mo., 162.)

The petition in the case now being considered charges, that the defendant wrongfully and negligently obstructed a public highway (Boonville Street) in front of plaintiff's property and house by placing stone, gravel and earth in the same, by which the drain channel, or gutter, in which the surface water falling and flowing on said street was carried off from said street, was filled up and destroyed, so that the surface water falling and flowing on said street was, by such wrongful act, negligence and carelessness of defendant, carried and flowed into the cellar in plaintiff's house, injuring the same, &c.

It will be seen that the particular carelessness and negligence complained of, and by which the plaintiff claims to have been damaged, was the filling of the drain or gutter on the side of the street, which carried off the surface water which

fell upon the street, so that the water was caused to flow from the street into plaintiff's lot and around his house. The evidence shows, that the earth, gravel and stone were placed on the street in grading and macadamizing the street; that the work was delayed for a while after the earth was placed in the street, in order to give it time to settle before the street was macadamized, and, that when it was so macadamized, gutters were made at the side-walks which carry off the water. It is assumed by the plaintiff, that it was the duty of the city to keep a drain or gutter open while the work was being done, so as to prevent the flow of the surface water of the street in and upon the plaintiff's premises, and that this was negligently omitted by the defendant, whereby it became liable to the plaintiff for the damage received from the water which flowed upon the premises and into his cellar.

The whole case seems to have been tried by the court upon this supposition. The court declared the law to be, that if the defendant could, by the exercise of reasonable diligence and skill in the grading of the street, have done such work so as not to cause the water flowing on such street to be flowed into plaintiff's premises, it was defendant's duty to do so, even at a reasonable expense to defendant; and if it carelessly or negligently omitted so to do, it is liable for the damages sustained. This assumes, that it was the duty of the city in the grading of a public street to so grade it as to prevent the surface water from flowing upon the lots of the adjoining proprietors, and that it was negligence in the city not to have done so, for which it is liable. I think it will be found by reference to the authorities, that no such liability exists. A liability would exist against a city for filling up or damming back a stream of running water, so that it would overflow its banks and flow upon the land of another; but a very different rule exists with reference to surface water. Judge Dillon, in his work on Municipal Corporations, says: "It is clear that there is no liability on the part of a municipal corporation for not exercising powers it may possess to improve streets, and, as a part of such

improvement, to construct gutters or provide other means of drainage for surface water so as to prevent them from flowing upon the adjoining lots. And, even where the work of graduating the streets is entered upon, there is not ordinarily, if ever, any liability to the adjoining owner, growing merely from the non-action of the corporation in not providing means for keeping surface water from property situate below the established grade of the street." (Dill. Mun. Corp., § 799; Gannon vs. Hargadon, 10 Allen, [Mass.] 106; Goodale vs. Tuttle, 29 N. Y., 459; Franklin vs. Fisk, 13 Allen, 211; Turner vs. Dartmouth, *Ib.*, 291; 7 Allen 19.)

In the case of Wilson vs. The Mayor of the City of N. Y., 1 Denio, 595, the plaintiff owned property at the corner of a square, being bounded on two sides by streets, the surface water could conveniently run off from plaintiff's property leaving it dry and uninjured. The city graded both of the streets on the sides of plaintiff's lot, thereby wholly obstructing the flow of the surface water, by which it accumulated on the plaintiff's lot to his damage, the city having failed to construct a ditch or sewer by which the water could be conveyed off. It was held in that case, that the plaintiff had no remedy, although it was charged in that case as in this, that the street had been so carelessly graded as to prevent the flow of the water from the premises. In the opinion in that case, the case of City of New York vs. Furze, 3 Hill, 612, referred to and relied on by the plaintiff in this case, is commented on and disapproved. In the case of The City of St. Louis vs. Gurno, 12 Mo., 414, this court referred to the case of Wilson vs. the Mayor of the City of N. Y. with approval, and clearly held in a case deemed to be identical in principle with this case, that the city was not liable. The case of Rose vs. City of St. Charles, 49 Mo., 510, referred to by plaintiff, does not conflict with the authorities above cited. The opinion in that case was predicted upon the ground, that the water diverted was not surface water, but a stream of water with defined banks though not strictly what is called a living stream of

water. In the case of Thurston vs. City of St. Joseph, 51 Mo., 510, the only point decided was, that the city was liable for negligently permitting a sewer in the streets of the city to be and remain out of repair and by negligence in its construction, by which damages resulted.

The theory, upon which the court tried this case, being in conflict with the law in reference to the obstruction of the flow of surface water, and that being the only wrong complained of in the petition, it follows, that the judgment must be reversed.

Judge Adams dissents; the other judges concurring, the judgment is reversed and the cause remanded.

NATHAN BRAY, *et al.*, Respondents, *vs.* ROBERT MCCLURY, *et al.*, Appellants.

PER CURIAM, ADAMS, J.

1. *Attachment—Affidavit—Sale—Title.*—The affidavit attached to the petition in an attachment suit merely stated, that to the best of affiant's knowledge and belief defendant was a non-resident of the State. *Held*, that under such affidavit the court obtained no jurisdiction over the land attached, and that a sheriff's deed thereunder would be void and convey no title.

PER ADAMS, J.

2. *Statutory attachment—Not in rem.*—A statutory attachment suit is not a proceeding *in rem*. The property is no party to the suit, but is brought before the court in aid of the remedy against the individual sued.

3. *Judgment—Order of publication—General execution—Levy of on property attached—Irregular—Corrected here.*—A general judgment on an order of publication is void. But a general execution levied only on attached property is simply irregular, and may be corrected at any time by an amendment *nunc pro tunc*.

PER NAPTON and VORIES, J. J., concurring.

4. *Attachment—Affidavit—What sufficient to support a sale.*—Where an affidavit, issued in aid of an attachment under § 6 of the Attachment Act (Wagn. Stat., 182), fails to state that plaintiff has a just demand against defendant, and fails to state any amount as due to plaintiff after allowing all just credits and set-offs, all subsequent proceedings, including sale and deed of land sold under the attachment, are void.

PER WAGNER, J. dissenting.

5. *Attachment—Proceeding in rem.*—Attachment suits founded upon constructive service are essentially in the nature of proceedings *in rem;* and the seizure of the property, or obtaining possession of the *res*, is therefore the basis of the court's jurisdiction.

6. *Attachment—Irregular affidavit—Subsequent proceedings not set aside collaterally.*—A defective or irregular affidavit in aid of an attachment, although it might cause a reversal of the judgment in the attachment proceedings, would not render the judgment or subsequent proceedings absolutely void. Where there was a valid writ and levy of the attachment, a judgment of the court, an order of sale, and a sale and sheriff's deed, the proceedings could not be set aside, in consequence of the irregularity, collaterally, in another suit.

7. *Attachment—Irregular affidavit—Sale—Deed—Title.*—An affidavit in aid of an attachment, which merely states that defendant is a non-resident, is sufficient, without more, to support the writ; and a levy of an attachment properly issued thereunder, together with judgment sale and sheriff's deed, will carry title to the property attached.

8. *Attachment—Publication—Judgment—Errors set aside, when—Erroneous execution will hold property collaterally.*—Where suit is begun by publication and attachment, the judgment will bind only the property attached; but a general judgment in such case, although informal, is nevertheless valid till reversed, and will authorize the issue of a special execution against the attached property. And a court will at any reasonable time correct such a judgment by an entry *nunc pro tunc*. And a general execution issued in such case against the property attached will bind it until reversed or set aside in a direct proceeding, and cannot be impeached or drawn in question in a collateral proceeding.

Appeal from Greene Circuit Court.

Crawford & Cravens, and Shafer & Duckwait, for Appellants.

I. The affidavit to the truth of the facts in the petition, and the additional affidavit of non-residence of the defendants, taken together, constitute almost a literal compliance with the statute. (Drake Att., Ch. 5, § 95.) The most important point in the affidavit is the ground of the attachment, which is here clearly stated. (Drake Att., Ch. 5, §§ 97, 98; *Ibid*, §§ 106, 113; Vankirk vs. Wilds, 11 Barb., 524; Curtis vs. Settle, 7 Mo., 452; Graham vs. Ruff, 8 Ala., 172; Wallis vs. Wallace, 6 How., [Miss.] 254; 7 Humph., 210; 1 Sm. & M., 503.)

II. The affidavit is not an element of jurisdiction, but merely a suggestion upon which the writ issues, and the entire absence of it would not render the proceedings void in a collateral proceeding. (Cooper vs. Reynolds, 10 Wallace, 308; Voorhees vs. Bank United States, 10 Pet., 449; Massey vs. Scott, 49 Mo., 278; Ludlow vs. Ramsey, 11 Wall. 587.)

The affidavit is no more a jurisdictional fact than the filing of a bond is; both alike in the order of the statute precede the issue of the writ. A failure in either particular, it is conceded, would be grossly irregular and erroneous, and would be good ground of reversal either on appeal or writ of error; but can be taken advantage of only by the defendant himself in one of the above ways, or on motion to quash before judgment. (Drake Att., Ch. 6, §§ 115, 143–144; Camberford vs. Hall, 3 McCord, 345; Wigfall vs. Byne, 1 Richardson, [S. C.] 412; VanArsdale vs. Krum, 9 Mo., 397; Beecher vs. James, 2 Scam., 462.)

III. The jurisdiction of the court attached by reason of the levy of the writ, and no subsequent error or irregularity in the proceedings either in the form of the judgment or the execution, could effect its validity in a collateral proceeding. (Hardin vs. Lee, 51 Mo., 241; Massey vs. Scott, 49 Mo., 278; Clark vs. Holliday, 9 Mo., 702; Cooper vs. Reynolds, 10 Wall., 308; Jackson vs. McCrea, 8 Johns., 362; Kempe's Lessee vs. Kennedy, 5 Cranch., 173; Fithian vs. Monks, 43 Mo., 502; Landes vs. Perkins, 12 Mo., 239; Reed vs. Austin, 9 Mo., 713; Draper vs. Bryson, 17 Mo., 71; McNair vs. Biddle, 8 Mo., 264; Coleman vs. McAnulty, 16 Mo., 176.)

John S. Phelps, for Respondents.

I. No writ of attachment can be lawfully issued by the clerk, unless an affidavit shall be made by the plaintiff or some one for him, and filed with the clerk, alleging some of the causes for which an attachment may issue, and that the plaintiff has a just demand against the defendant, stating the amount which the affiant believes the plaintiff ought to recover after allowing all just credits and set offs. Such affidavit substantially com-

plying with the law is a pre-requisite to issuing a writ of attachment, and without which the attachment and proceedings under it are void. (Drake Att., §§ 83, 84, 437; Cooper vs. Reynolds, 10 Wall., 319 ; Hardin vs. Lee, 51 Mo. 241; McCulloch vs. Foster, 4 Yerg., 162; Conrad vs. McGee, 9 Yerg., 428; Maples vs. Tunis, 11 Humph., 108; Staples vs. Fairchild, 3 Comst. 41.) Affidavit must positively state indebtedness and not inferientially. (Quades vs. Robinson, 1 Chandler, 29; Clark vs. Roberts, 1 Ill., 285; Pool vs. Webster, 3 Met., [Ky] 278; Whitney vs. Brunette, 15 Wis., 61; Talbot vs. Worth, 19 Wis., 174; Greenvault vs. Mechanic's Bank, 2 Dougl., 498.)

II. But the record (Merchants' Bank vs. Ferguson & Stephens,) shows the proceeding was not by attachment, but a proceeding to obtain a general judgment under Act of 1855 by publication. Affiant states in his affidavit, "the matters and statements contained in the foregoing petition he believes to be true," and that defendants "are non-residents of the State of Missouri, to the best of his knowledge and belief."

III. An affidavit for an attachment must positively state, 1st. That plaintiff has a just demand against defendant. 2nd. The amount he believes plaintiff ought to recover after allowing all just credits and set-offs. 3rd. That he has good reason to believe, and does believe, in the existence of some of the causes for which an attachment may issue.

IV. Plaintiff took his general execution and not a special execution, and the lands were sold on a general execution.

Adams, Judge, delivered the opinion of the court.

This was an action of ejectment, commenced in the Dade Circuit Court, for lands lying in that county, and taken by change of venue to the county of Greene. Both parties trace their title to John N. Ferguson as the original source, who was formerly seized of the premises. The record shows, that the Merchants Bank of St. Louis brought a suit by attachment against Ferguson and others on a bill of exchange in 1865 in the Dade Circuit Court. The petition was in the usual form,

verified by affidavit, as the practice act required at that time.

To the petition was appended an additional affidavit, merely stating that to the best of affiant's knowledge and belief the defendants were non-residents of the State. Upon the petition thus verified, and the additional affidavit of non-residence, a writ of attachment was issued, and was by the sheriff levied on the lands in dispute. An order of publication was made and duly published in a newspaper in pursuance of law. The defendants did not appear and were not served with a summons. At a subsequent term of the court a special judgment was rendered in the cause against the defendants and the attached property. On the margin of the record of this judgment a memorandum, "erroneous entry," is written. On a subsequent page is entered another judgment, which appears to be between the same parties and is in the form of a general judgment instead of a special one. Afterwards, the clerk issued a general execution, which was levied on the attached lands, and they were sold by the sheriff to the defendants, and they are the lands in controversy. A deed was made by the sheriff reciting the proceedings in the attachment suit, a rendition of the special judgment, and a sale thereunder, and was duly acknowledged. At the instance of the plaintiffs the court excluded this deed as evidence at the trial, and instructed, that the sheriff's deed offered in evidence was wholly void and conferred no title on the defendants to the lands sued for. A verdict and judgment were rendered for plaintiffs, and a motion for a new trial was overruled.

It is obvious from this statement that the main point here is, whether the writ of attachment and the proceeding thereunder were void. Before an attachment can issue, the statute law requires that the plaintiffs shall file an affidavit in the clerk's office of the court in which the suit is brought, stating that he has a just demand against the defendant and the amount thereof which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, and that he has good reason to believe, and does believe, in the exist-

ence of one or more of the causes, which according to the provisions of the statute would entitle the plaintiff to sue by attachment. (R. C., 1855, p, 240, §§ 5, 6.) There was no such affidavit made in this case, although the statute requires it before a plaintiff is entitled to an attachment. This requirement of the statute is jurisdictional, and not simply directory. The court or clerk has no jurisdiction to issue an attachment without the required affidavit. The affidavit of non-residence was made to procure an order of publication, and contained none of the essential requisites of an affidavit for the writ of attachment. As there was no affidavit at all filed for the purpose of suing out the attachment, it is unnecessary to discuss the question, whether a defective affidavit could be amended so as to sustain the attachment. In my judgment that could be done; but as that question is not in the case, it is unnecessary to decide it.

2nd. But it is urged that as the writ of attachment was in fact issued and levied on the lands in dispute, that brought them before the court and gave the court full jurisdiction over them to render a special judgment, without regard to any prior or subsequent proceeding; that this is in the nature of a proceeding *in rem*, and the land attached is the *res*, and the court can render a valid judgment for sale of the land without complying with any of the other requisites of the statute; that the sale and deed of a sheriff would pass the title whether there was any affidavit at all, or any order of publication made or published. This proposition is so monstrous, and would lead to such ruinous consequences, that I cannot yield it my assent. The authorities seem to be conflicting in the different States on this question. Those affirming the proposition base their decisions on the doctrines of maritime law. But there is very little analogy, if any, between attachment suits, which derive their existence exclusively from statutory law, and proceedings in admiralty. In maritime cases, the ship or vessel libelled is the real party defendant. The doctrine of the maritime law is, that the whole world is bound by the proceedings whether notified or not. If notice is required, it is

merely directory and not necessary to give jurisdiction, and a judgment rendered against the ship or vessel, with or without notice, is binding, and a sale under it passes the whole title.

This doctrine is not applicable to a statutory attachment. The real suit is in favor of and against individual persons. The property itself is, in no sense of the word, a party to the suit, but is brought before the court as ancillary or in aid of the remedy against the real party, who is presumed to be the owner of it. The attached property does not represent the defendant, but is merely held in *custodia legis* to satisfy the debt that may be proven to exist against the defendant.

How can a judgment be rendered against the defendant's property, unless he is before the court by service of summons or personal appearance, or by constructive notice by order of publication duly published when that is required? The statute must be substantially complied with in order to render the jurisdiction complete. There must be first a petition and the necessary affidavit to give jurisdiction to issue the writ of attachment, and when the attachment is levied, the court may proceed to take care of the property, and if necessary, may sell perishable property and keep the proceeds of the sale in custody till final judgment. But to warrant any such judgment, the defendant must be brought before the court in the manner indicated by the statute, either by service of summons or appearance, or by an order of publication duly made and duly published. These are all jurisdictional steps, and not merely directory, to render the jurisdiction complete. I do not say that the Legislature could not order attached property to be applied to the payment of a debt of a non-resident without any notice at all. It has not attempted to do so, but has thrown these jurisdictional safeguards around it to be observed, before a defendant can be robbed of his estate by an *ex parte* proceeding.

A court of equity has the power to pass title to real estate within its jurisdiction. The first step required is to file a petition, describing the land to be acted on and where situated. That brings the land before the court, and makes it a case in

the nature of a proceeding *in rem*. The land being the *res* is as much before the court as it is when attached, and the court has precisely the same jurisdiction over it. Can the court pronounce a decree divesting the title of the defendant, and vesting it in the plaintiff, without issuing any writ, and without any order of publication duly made and published, and without any appearance? Would not such a decree, if valid, be judicial robbery: and yet that is precisely the power contended for in attachment suits.

3rd. If there had been any authority to render any judgment at all in this case, the special judgment was the proper one, and a general judgment, simply on an order of publication, was void. The execution being general was only irregular. As it was only levied on the attached property, as to that property it amounted to a special execution, and the error might at any time be corrected by an amendment *nunc pro tunc*.

As there was no affidavit to warrant the attachment, the subsequent proceedings were void. This leads to an affirmance of the judgment.

Judgment affirmed. Judges Napton and Vories file a separate concurring opinion. Judge Wagner files a dissenting opinion. Judge Sherwood, having been of counsel, did not sit.

NAPTON, Judge, delivered the separate concurring opinion.

I concur with Judge Adams in regarding the affidavit required by the 6th section of the Attachment law as essential to give the clerk a right to issue the writ, and that this affidavit must substantially comply with the requirements of said section. The affidavit in this case is merely that the defendant is a non-resident; but it is not stated, that the plaintiff has a just demand against the defendant, nor does it state any amount as due to the plaintiff after allowing all just credits and off-sets. This is the very basis of the jurisdiction of the court. The fact that the defendant is a non-resident is a very unimportant one, if he really owes nothing to plaintiff, and the plaintiff's oath, that the defendant is justly indebted to him in

an amount stated, is essential to authorize the issuance of the writ. There is really no ground for an attachment, whether the defendant lives abroad, or otherwise has conducted himself so as to bring him within the provisions of the attachment law, unless there is a valid subsisting claim against him; and the statute has not allowed this attachment process on the mere filing of a petition, sworn to under the law as it formerly existed. For this reason, I concur in affirming the judgment. It is not necessary to give my opinion on the question of the publication, as it does not arise in this case. Judge Vories concurs in this view.

WAGNER, Judge, delivered the dissenting opinion.

This was an action of ejectment commenced in the Dade Circuit Court for the recovery of certain lands lying in that county. A change of venue was taken to Greene County, where a trial was had and judgment was rendered for the plaintiffs. Both parties trace their title to one John N. Ferguson, as an original source, who was formerly seized of the premises. The record shows, that in 1865 the Merchants' Bank of St. Louis brought a suit by attachment in the Dade Circuit Court against Ferguson and others on a bill of exchange. The petition was in the usual form, properly verified in conformity with the law as it then existed. To the petition was appended an additional affidavit, stating that to the best of the affiant's knowledge and belief, the defendants were non-residents of the State. Upon the petition thus verified and the affidavit of non-residence, a writ of attachment was issued, and was by the sheriff levied on the lands in controversy. An order of publication was also made against the non-resident defendants, notifying them of the commencement of this suit and the nature thereof. This order was properly published in a newspaper in pursuance of law. At a subsequent term of the court, a special judgment was rendered in the cause against the defendants, and an order made for the sale of the lands attached under a special execution. On the margin of the record of this special judgment is written "erroneous entry."

On a subsequent page of the record, and at the same term of the court, is entered another judgment between the same parties, and which appears to be in the same cause, which differs from the one already referred to in the fact that it is a general judgment instead of a special one. Afterwards, the clerk issued a general execution, which was levied on the lands attached, and they were sold by the sheriff to the defendant, and these are the lands now in controversy.

The deed made by the sheriff to the defendant recited the proceedings in the attachment, the rendition of a special judgment, and a sale thereunder, and was properly acknowledged. At the instance of the plaintiff, the court excluded this deed at the trial, and the defendant excepted. It also gave an instruction on the same side, that the sheriff's deed offered in evidence was wholly void and conferred no title upon the defendant to the lands sued for and was excluded from the jury.

The defendant asked an instruction, which was the converse of the one given for the plaintiff, which the court refused, and he has now brought the case here by appeal. The principal grounds now urged by plaintiffs' counsel in support of the judgment are: that the proceedings in the attachment suit were void, because there was no affidavit justifying them, and that the judgment and execution were general, and therefore wholly unwarranted by law.

The affidavit alleged the non-residence of the parties defendant according to the first sub-division of section one of the act respecting attachments. (1 R. C., 1855, p. 238.) But the 5th section of the same act, in defining what the affidavit shall contain, says, that it shall be made by the plaintiff, or some person for him, and shall state, that the plaintiff has a just demand against the defendant, and that the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, is ——dollars, and that he has good reason to believe, and does believe, in the existence of one or more of the causes authorizing an attachment under the first section.

It is contended, that as the petition stated the essential facts required in the affidavit and was duly verified, that, in conjunction with the affidavit of non-residence, was a substantial compliance with the statute. But we think there is some difficulty in maintaining this view. The petition must state a cause of action, but the attachment is something distinct from, and in addition thereto. The statute doubtless contemplated, that the affidavit for the attachment should be complete in itself, and contain all the specified requirements. But although we may regard the affidavit as informal and defective, it does not thence follow, that the subsequent proceedings which resulted in a judgment are entirely void. Between the parties, upon an appeal or writ of error, they might have been reversible, but, in holding them wholly void on a collateral issue in a contest involving the rights of other persons, a different question is presented. In Alexander vs. Haden (2 Mo., 228) it is held, that where a judgment is rendered in a suit by attachment on an affidavit not warranted by the statute, the judgment will be set aside for irregularity even after the lapse of several years. But in that case there was a direct proceeding between the original parties to the suit. No intimation was made that the judgment was an absolute nullity.

The principle has been so constantly acted upon, even from the earliest periods, that it has become axiomatic, that, when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court that rendered it. Attachment suits founded upon constructive service are essentially in the nature of proceedings *in rem*, and the seizure of the property, or obtaining possession of the *res*, is, therefore, the basis of the court's jurisdiction.

In the case of Cooper vs. Reynolds (10 Wall., 308,) it was decided, that the seizure of the property of the defendant under the proper process of the court, was the foundation of the court's jurisdiction, and that defective or irregular affidavits and publications of notice, though they might reverse the

judgment in such case for error in departing from the directions of the statute, would not have the effect of rendering the judgment or the subsequent proceedings void; and that where there was a valid writ and levy, a judgment of the court, an order of sale, and a sale and sheriffs' deed, the proceedings could not be held void when introduced collaterally in another suit. The following language of Judge Miller in delivering the judgment is remarkably clear and precise: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us, that the seizure of the property, or, that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into court the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer, whose duty it is to issue the writ, may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property." The same doctrine was re-asserted in Ludlow vs. Ramsey (11 Wall., 581) by the same court. So in Massey vs. Scott (49 Mo., 281,) this court says, that the Circuit Court obtained jurisdiction by the levy of the attachment. It is also intimated, that a publication would be necessary to complete the jurisdiction, but even admitting this theory, it furnishes an authority in the present case; and in Hardin vs. Lee, (51 Mo., 241) where the subject was again considered, it was declared, that in attachment suits the juris-

diction over the subject matter is obtained by the levy thereon of a writ properly issued, and no matter what, or how great, irregularities may subsequently occur, its judgment in regard thereto will be valid and binding until reversed by error or appeal, or set aside in a direct and appropriate proceeding for that purpose. (See also Freem. on Judg'ts, § 126.) The affidavit, though admittedly defective, was sufficient to support the writ. To say that it was not made under the attachment law, is a sheer assumption, and the action of the clerk and court conclusively shows its fallacy.

As to the judgment and execution, though admittedly informal and irregular, can they be treated as absolutely void in this action? In the case of Massey vs. Scott, above cited, it was held, that, where suit is begun by publication and attachment, the judgment will bind only the property attached; but that a general judgment in such case, although informal, is nevertheless valid till reversed, and will authorize the issue of a special execution against the attached property, and that a court would at any reasonable time correct such a judgment by an entry *nunc pro tunc.*

If the general execution had been issued and levied on property other than the attached property, the levy and sale under it would have been void. (Clark vs. Holliday, 9 Mo., 702.) The reason for this is plain enough, because in such a case the property would not have been subject to the jurisdiction of the court. That the judgment and execution in the present case could have been amended is not doubted, and proceedings which are amendable are not void. (Hardin vs. Lee, *ubi supra;* Cooper vs Reynolds, 10 Wall., 308; Durham vs. Heaton, 28 Ills., 264; Parmlee vs. Hitchcock, 12 Wend., 96; Stewart vs. Severence, 43 Mo., 331.)

In Hunt vs. Loucks (38 Cal., 372) the Court say: "Like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose, and, until set aside, all acts which have been done under it are valid. In a collateral action it cannot be brought in question, even by a party to it, much less by a stranger to

it. Even directly it cannot be attacked by a stranger, for it does not lie in the mouth of A. to say, by it B. has been made to pay too much money, and therefore all proceedings under it are null and void." It is a matter that cannot be precisely determined, upon which of the two judgments found upon the record book in this case the execution was issued. The first was a special judgment regular in all its forms, and was the proper judgment authorized in the case. No explanation is given as to how the words "erroneous entry," written on the margin of the record, were placed there. For aught that appears, they may have been written there by some wholly unauthorized person.

There is nothing to show, that this judgment was ever ordered by the court to be set aside or to be for naught held. In such a case, where a doubt is raised between the validity of two acts, the presumption would be in favor of the legality of the proceedings of the court. But, if we concede that a general judgment was actually rendered, upon which a general execution was issued, it by no means follows, that they can be held void collaterally. Had property been sold, other than that on which the writ of attachment was levied, then there can be no question that the sale would have been an utter nullity. But the very property that was sold, and which is here in controversy, was the property that was attached, and thus brought within the jurisdiction of the court. Jurisdiction having attached, the court could legally order it to be sold or disposed of, and though the judgment and execution were unquestionably irregular and informal, they were still valid until set aside or reversed in a direct proceeding instituted for that purpose, and they could not be impeached or drawn in question in a collateral action.

I am of the opinion that the judgment below should be reversed, and the cause remanded.

THE STATE to the use of J. P. MUELLER, ADM'R OF THE ESTATE OF GEORGE PFAUTSCH, dec'd, Respondent, *vs.* OTTO MANNIG AND RUDOLPH C. SCHLENDER, Appellants.

1. *Principal and surety—Extension of time—Contract—Concurrence of surety—Pleading.*—The surety on a bond will not be discharged by reason of an extension given to his principal, unless the time was extended by virtue of a contract made by the creditor with the principal, and without the concurrence of the surety. And the extension cannot be pleaded as a defense by the surety unless these facts be set up.

Appeal from the Gasconade Circuit Court.

Henry Flanagan, for Appellants.

I. The answer alleged, and the motion to strike out, admitted, that when the judgment was rendered, England was able to pay it, and hence, the agreement to stay execution for four months during which his property was swept away by other parties, deprived the sureties of their recourse upon England and it was, therefore, a fraud upon them. The plaintiff having made his election with a full knowledge of his remedies, he is concluded by that election. (Beedy vs. Bengert, 1 Ham. (Ohio) 157; Winterbowen vs. Haycroft, 7 Bush., [Ky.] 57; Hendrickson vs. Hinckley, 17 How., [U. S.] 443; Burton vs. Hynson, 14 Ark., 32.) The remedy against the clerk under the statute and which is highly penal, merges the other remedies, and the plaintiff in adopting it waived all others.

II. The extension of four months and the treble damages formed the basis of a valid and binding contract. The agreement to suspend the execution was enforcible at law. We submit, therefore, that it discharged the sureties. (Calvin vs. Wiggin, 27 Ind., 489; Robinson vs. Miller, 2 Bush., [Ky.,] 412; Howe vs. Railroad, etc., 37 N. Y., 297; Brooks vs. Wright., 13 Allen, [Mass.,] 72.) In Bullit's Ex'r vs. Winston, 1 Munf., 267, the Court of Appeals of Virginia held, that the surety was discharged on the ground, that the creditor who held a judgment against the principal, had by a letter addressed to the sheriff, countermanded the execution against

the principal. And in the Commonwealth vs. Miller,(8 Serg. & Rawle, 458), the Supreme Ct. of Pennsylvania held, that when the creditor has the means of satisfaction in his own hands and chooses not to hold it, the surety is discharged. "If the creditor does any act for the ease of the principal without the privity of the surety, by which the *security is injured or exposed to injury*, that act may be laid hold of for the surety's relief;" per Gaston, Judge, in Cooper, etc. vs. Wilcox, 2 Dev. & Bat. Eq., 91. (Brown vs. Riggins, 3 Ga., 405; Rees vs. Berrington, 2 Ves. Sr., 540; Law vs. East M'd Co., 4 *Id.* 833; Clark vs. Niblo, 6 Wend., 236.) The answer clearly shows, that the sureties have been prejudiced by the act of the creditor.

III. After judgment, the rule is more stringent as against the creditor. He then has the property of the principal debtor in his power and he lets it go at his peril; he is a trustee for the sureties and he must not jeopard their interests without their consent by any act or omission of his (Lennox vs. Prout, 3 Wheaton, 520; Bay vs. Tallmadge, 5 Johns. Ch., 305; Rathbone vs. Warner, 10 Johns., 591; Nelson vs. Williams, 2 Dev. & Bat. Eq., 118; Thomas vs. Young, 15 East., 617, and cases cited.)

IV. The answer tendered a good defense and it was error to strike it out.

***Seay & Kisskaddon*, for Respondent.**

I. An agreement by the creditor to enlarge the time of payment of a debt unless it is made upon such consideration or in such form as to be binding upon the creditor, and to estop him from suing the principal does not discharge the surety. (McLemore vs. Powell, 12 Wheat., 554; Nichols vs. Douglas 8 Mo., 49.) To constitute an extension of time to the principal by the creditor as a discharge of the sureties, there must be a new and valid agreement between the creditor and principal varying the original contract. (King vs. Baldwin, 2 Johns. Ch., 554; S. C. 2 Am. Lead. Cases, 364; see also, U. S. vs. Simpson, 3 Penn., 437; Farmers' B'k vs. Reynolds, 13

Ohio, 84; Lenox vs. Prout, 3 Wheat., 520; Baker vs. Marshall, 16 Vt., 522.) No such contract is stated in defendant's answer. The debt being established under the statutory proceeding in question, the plaintiff was entitled to treble damages at all events, and he could obtain it without granting further time. And mere delay in calling upon the principal will not discharge the surety. Cases cited, *supra*, and Wells vs. Mann., 45 N. Y., 327.

Sherwood, Judge, delivered the opinion of the court.

This was a suit to the use of J. P. Mueller, administrator of the estate of George Pfantsch, deceased, brought in the Gasconade Circuit Court against Mannig and Schlender, sureties on the official bond of Joseph C. England as clerk of said Circuit Court, on account of certain sums of money alleged to have been collected by said England as such clerk on fee bills; and which sums he had failed to pay over to George Pfantsch, deceased, to whom it was alleged in the petition they should have been paid.

The defendants answered, pleading the statutory general issue, and also special matters to the effect that a suit had been previously brought against England alone on account of the same matters alleged in the petition as a cause of action in the present suit; that England and said administrator had adjusted and settled the claims of the said administrator against England, by the latter permitting judgment to go against him in said court for treble the amount the administrator claimed; that this judgment was rendered in 1870; that the administrator, in consideration of England so permitting judgment to go for treble the amount of his claim, granted and agreed to a stay of execution for four months; that, at the time of the rendition of that judgment and for some time thereafter, England was seized and possessed of property, both real and personal, amply sufficient to satisfy the judgment, but, that in consequence of such agreement, the administrator did not enforce the collection of the judgment, and, by reason thereo others converted and appropriated England's property and effects

This special matter, on motion of the plaintiff, was stricken out. The defendants refused to amend. The plaintiffs introduced testimony tending to establish the allegations of the petition. The defendants were refused permission to introduce evidence in support of that portion of their answer which had been stricken out. The court then gave judgment for the plaintiff, and this cause comes here on appeal.

The whole case turns upon the sufficiency of the special matter, upon which defendants relied as a bar to plaintiff's action. For if no error was committed in striking that out, certainly none occurred upon the refusal to admit evidence in support of that portion of the answer which had been adjudged insufficient. The precise point, as above presented, has not, that I am aware of, ever been passed upon, certainly not in this State. The rule, however, is well settled that the surety will not be entitled to a discharge, unless a valid agreement for extension of time to the principal has been made between the latter and the creditor, and this, too, without the assent of the surety. Thus, Chancellor Kent, in King vs. Baldwin, 2 Johns. Ch., 555, in discussing the effect of the creditor granting delay to the principal, says: "All the cases of relief of surety have gone upon the ground that time was given to the principal by contract, without consent of the surety. The doctrine is, that the surety is bound by the terms of his contract; and, if the creditor, by agreement with the principal debtor, without the concurrence of the surety, varies these terms by enlarging the time of performance, the surety is discharged, for he is injured and his risk is increased." To the same effect, see Com. on Cont. 266, 267, *et seq.*, and cas. cit.; 2 Pars. Cont., 22–4 and cas cit.; Oberndorf vs. UnionBank, 31 Md., 126, and cas. cit.

It will be perceived, then, that only when time, granted to the principal by contract with the creditor, is superadded to absence of sanction on the part of the surety, that the exoneration of the latter will be accomplished. And, since these elements of extension of time on the one hand, and approval of such extension on the other, must unite in order to operate as

the discharge of him who has bound himself to answer for the default of another, it would seem to follow as a necessary and logical sequence, that whenever it becomes material to his defense to plead such discharge, he should so frame his pleading as to make it sufficiently comprehensive to embrace the above stated grounds, upon which his reliance must ultimately rest.

If this view be correct, the answer of the defendants was clearly defective in not alleging, in addition to its other allegations, that the contract therein referred to was made without their consent.

Judgment affirmed. All the judges concur.

C. E. Rice, Respondent, *vs.* Pacific Railroad, Appellant.

1. *Mandamus—Certificate of stock—Statute of limitations—Begins to run, when.*—A subscriber of stock in the Pacific Railroad Company in the year 1859 had paid up all calls including $70, which had been paid to an agent of the company who died without transmitting the sum. In 1870 the company declared the stock forfeited by reason of the non-payment of the $70.

In mandamus to compel the issue of certificate of stock, the company set up the statute of limitations. *Held*, that the statute did not run in favor of defendant till the stock was declared forfeited.

Appeal from Cole Circuit Court.

J. N. Litton and J. L. Smith, for Appellant.

I. The right to maintain an action for a stock certificate is perfect the moment the payment is completed, as it is the duty of the company to issue the certificate without demand, and plaintiff's right to it was complete without demand. The case is analogous to a note payable at sight or on demand, on which it is universally held, that the statute of limitations runs from the date of the note, and not from demand. (Easton vs. McAllister, 1 Mo., 662; Ang. Lim., 89, § 95; Taylor vs. Whitman, 3 Grant, [Penn.] 138; Howland vs. Edwards, 24 N. Y., 308; see also Johnson vs. Smith's Adm'r, 27 Mo., 593; Stafford vs. Richardson, 15 Wend., 302.)

It is held that the right of a R. R. Company to maintain an action on a subscription to its stock is barred by a failure to make calls within six years. (Pitts. & C. R. R. vs. Graham, 36 Penn., 77; *Ib.* vs. Byers, 32 Penn., 22; McCully vs. Pitts. & C. R R., 32 Penn., 25.)

Also, when a man deposited money in a bank to be drawn on demand, it was held, that the statute ran from the time of deposit. (Pott vs. Clegg, 16 Mees & W., 321.)

II. The plaintiff's remedy was not the writ of mandamus, but an action for damages. A writ of mandamus will not lie in such a case. There is no claim that there was any, but a pecuniary value attached to the certificate by the plaintiff. All he claims is the loss of the benefits of the business of the company. (State vs. Rombauer, 46 Mo., 155.)

Miller & Hamilton, for Respondent.

I. Up to September, 1870, appellant acted upon and admitted the right of the relator, for it was not until then that it attempted to forfeit the stock of the respondent; nor until then, did appellant assume to hold in its own right. It will be seen that on the 14th December, 1871, the petition was filed in open court, about fifteen months after adverse claim set up; and writ issued14th May, 1872, less than two years after adverse claim was set up. (Keeton vs. Keeton, 20 Mo., 530; 3 Johns. Ch., 190, 384; 5 Johns. Ch., 522; 7 Johns. Ch., 90.)

Napton, Judge, delivered the opinion of the court.

This was an application for a mandamus to compel the Pacific R. R. Co. to issue certificates of stock to plaintiff for seven shares of the capital stock of said company. The petition was filed in December, 1871. There is no dispute that this subscription was fully paid up in 1859, either to the company or its authorized agents.

The defendant pleaded the statute of limitations. On the trial it appeared, and was so found by the court, that plaintiff had fully paid up on all calls for his seven shares of stock;

and the records of the defendant, which were offered in evidence, clearly showed that he was admitted to have paid all but about 70 dollars. The evidence established clearly, that this 70 dollars was paid to Col. Grover, an agent of the company, who died shortly after the payment. Then on Sept. 28, 1870, the Board of Directors of said company passed a resolution, declaring the plaintiff's stock to be forfeited for the reason that this last call for $70 had not been paid. Various instructions were asked concerning the statute of limitations, which the court refused to give. It is useless to copy these instructions.

We are of the opinion, that the statute did not run in favor of defendant until 1870, when the trust was repudiated, and the defendant's stock declared forfeited. This suit was commenced in 1871. The plaintiff was in fact, assuming the court to have correctly found a full payment of the stock in 1859, a member of the company and a stockholder. No attempt was made until 1870 to debar him of this position. Then a resolution was passed, declaring his stock forfeited by reason of a failure to pay a small sum charged against him in the books of the company. Up to this date the plaintiff had no right to assume, that his position as a stockholder would be disputed, and he had no right of action. The defense of the statute of limitations is of no avail, since previous to 1870 the plaintiff's position as stockholder was never denied, and the court properly refused all instructions or declarations of law on that point.

The judgment of the Circuit Court is affirmed, the other judges concurring. Judges Wagner and Sherwood absent.

J. D. McCutchen, Respondent, *vs.* T. A. Windsor, Appellant.

1. *Schools—Sub-districts—Teachers in—Removal of, by local board—When authorized—Action of damages—Directors personally liable, when,*—Under the act of 1870, (Wagn. Stat., 1243, § 7, amendatory of Gen. Stat., 1865, p. 258, § 6,) the local directors of a school sub-district have no authority to dismiss a teacher therein, unless for good and sufficient cause shown. And in an action against the board for discharging him, the question of his incompetency, or of the existence of other cause for his removal, is one for the jury to determine, and will not be weighed by this court.

Where the action was not on contract, but to recover damages against members of the board for forcibly dispossessing plaintiff of the school house, and wantonly obstructing him in the discharge of his duty; *held*, that defendants were not acting in the scope of their authority and were individually liable.

Appeal from Cooper Circuit Court.

Hayden & Thompkins, for Appellant.

"If the defendants as directors of the sub-district employed plaintiff as teacher, they had the right in their official capacity in behalf of the sub-district to discharge him, and are not personally liable for such act." The power to manage and control the local interests and affairs of the sub-district is vested in the directors by statute. (Wagn. Stat., 1243, § 7.) It is a broad and general power without qualification, embracing in its range the employment of teachers, and the necessary incident or implied power of removing them whenever the directors may deem it wise or prudent to do so. Being thus invested with such power, the exercise of it is a duty enjoined by law, and the extent of its exercise is measured by the judgment or discretion of the directors on the emergency in any particular case calling for its exercise. The power of dismissal or removal of teachers in the school law, under which the appellants acted in removing the respondent, is general, and without any of the limitations or conditions prescribed by the law of 1865. (Gen. Stat., 258, § 6.) The law under which they acted also constitutes, and is a part of, the contract made between the appellants as directors, and the respondent as teacher, and his removal worked no wrong

which is actionable. (See Gildersleeve vs. Board of Education, 17 Ab. Pr., 201; Rumford vs. Wood, 13 Mass., 199.)

If the directors exceeded their power (which is by no means admitted), and such excess resulted from error of judgment, or mistake, or misapprehension, and not from fraud or malice (of which there is no evidence), then they certainly are not individually liable. (See 2 Hilliard Torts, [3 Ed.] 415, § 2, notes 4, 5; Smith vs. Poor, 40 Me., 415; Mayor &c., vs. Eschbach, 18 Md., 276; Livermore vs. Freeholders, &c., 5 Dutch., 245; 2 Hilliard Torts, 419, § 4; 3 La., 568; 11 La., 41; Godbold vs. Bank, &c., 11 Ala., 191; Vose vs. Grant, 15 Mass., 505; 2 Hilliard Torts, 119; Dil. Mun. Corp., 711, § 755, note 1 and authorities cited.)

If they were charged with fraud or malice, it would devolve on the respondent by evidence to prove it. (Reed vs. Conway, 20 Mo., 33; 26 Mo., 16, *et seq.*; Boisliniere vs. St. Louis County, 32 Mo., 375; Also Dill. Mun. Corp., 214; Wilkes vs. Dinsman, 7 How., 131.)

Draffin & Muir, for Respondent.

I. The local directors of a school sub-district have no power to discharge, at pleasure, a teacher before the expiration of his contract. (Sess. Acts, 1870, p. 141, § 7; Finch vs. Cleveland, 10 Barb., 297.)

II. The directors are liable in damages in their individual capacity for their wrongful conduct in dismissing the plaintiff. (Robinson vs. Dodge, 18 John., 357; 17 Wend., 437; 1 Chitty Pl., 77; Pike vs. Megoun, 44 Mo., 494.)

Wagner, Judge, delivered the opinion of the court.

This was an action against the defendants, two local directors of a school sub-district in Cooper county. The plaintiff alleged in his petition, that on the 30th day of October, 1871, he, having the proper certificate of qualifications, entered into a contract in writing with the defendants as directors of the sub-district to teach a school for the term of five months, for the sum of fifty dollars per month; that he entered upon

the discharge of his duties under the contract, and taught the school for one month; that afterwards, about the 27th of November, 1871, and before the expiration of his contract, the defendants wrongfully, illegally and oppressively, and in the abuse of their official authority, took forcible possession of the school house, and dismissed the plaintiff as teacher, all against the plaintiff's consent, and to his damage, &c.

The main points relied on in the answer were, that the plaintiff was dismissed on account of incompetency, and that the defendant's were acting in an official capacity and were therefore, not individually liable. To this answer a replication was filed. There was a verdict and judgment for the plaintiff.

In reference to the ground of incompetency, it is only necessary to say, that that question was directly and fairly submitted. to the court under proper instructions and found for the plaintiff, and is not reviewable in this conrt. The only question then is, whether the defendants, in dismissing the plaintiff and forcibly keeping him out of the school house, and thus preventing him from complying with his contract, were in the legal exercise of their official functions, and in consequence thereof are shielded from individual liability.

Whether the directors possess the authority to dismiss a teacher holding a proper certificate of qualifications, or if they have the authority, when they may exercise it, are questions of some difficulty and involved in great doubt. Under the law of 1865 (Gen. Stat., p. 258, § 6,) it is declared, that "it shall be the duty of the school directors in each sub-district to manage and control its local interests and affairs; to employ teachers, to certify the amount due them for services to the township clerk, who shall draw an order on the county treasurer, as hereinafter provided, for the amount; and to dismiss any teacher at any time for such reason as they may deem sufficient; provided, such dismissal shall receive the sanction of the township board."

In this law the power to dismiss for any reason the directors might deem sufficient is given in express terms. But to

provide against its capricious or arbitrary exercise, a revisory or appellate jurisdiction is vested in the township board. It shows unmistakably that the Legislature did not intend that the directors should have the full power to pass sentence of degradation upon a teacher by dismissing him, unless another body should sanction the proceeding, and where a hearing of the case could be had if desired. But under the law of 1870, which governs this case, the statute is essentially modified and the powers of the directors restricted. For the section above alluded to the following provision is substituted: "It shall be the duty of the directors in each sub-district to manage and control its local interests and affairs. They shall have power to contract with and hire legally qualified teachers for and in the name of the sub-district, which contract shall be in writing, and shall specify the number of months the school shall be taught, and the amount of wages per month." (Wagn. Stat., 1243, § 7.)

The only power delegated to the directors in this section is to employ legally qualified teachers. They must see that he is legally qualified and then they may hire him by making a contract in writing; and, so far as any direct provision in the statute is concerned, here their authority ends. If any power of dismissal exists, it is to be deduced by implication only. Cases might undoubtedly occur, when the teacher was shown to be palpably deficient, grossly immoral, or unquestionably unfit, which would justify and warrant the directors in removing him. But this would amount rather to a breach or violation of the contract on his part than on theirs. In Finch vs. Cleveland (10 Barb. 290), where the law was in substance the same as ours, and empowered the trustees among other things, "to contract with and employ all teachers in the district," it was held, that the trustees had no power to dismiss the teacher without cause and against his consent, before the expiration of his contract. The court pointedly declares: "We are not aware of any law which vests the trustees of a school district with power, at their own pleasure, and without just cause, to put an end to the contract of a

teacher, before the time limited for its expiration." In the case of Gildersleeve vs. the Board of Education (17 Abb. Pr. 201) it is decided by the New York Court of Common Pleas, that under the local law prevailing in the city of New York the power to employ teachers carried with it the power to remove them. But this decision was in a suit for wages, and was based upon the rules and regulations of the Board of Education, which conferred the authority. With us no such rule exists.

Manifestly then, before the directors had the right to dismiss the plaintiff in this case, it was incumbent on them to show a good and sufficient cause for their act. The evidence does not show that cause. The main principle that seems to have actuated them was that they preferred another person. It is true that they set up some other matters, but they are trivial and amount to nothing. But it is not our province to comment on the testimony, as that has been submitted and passed upon by the legitimate and appropriate triers of the facts. It is however insisted, that although the defendants may not have been justified in doing what they did, still, as they acted in an official capacity, they cannot be made individually liable. The rule is firmly established, that officers, acting in a judicial or discretionary capacity, will not be liable unless guilty of either willfulness, fraud, malice, or corruption; or unless they knowingly act wrongfully and not according to their honest convictions of duty. (Schoettgen vs. Wilson, 48 Mo., 253.)

But where trustees, directors, or commissioners do acts not within the scope of their authority, or are guilty of negligence in doing that which they are empowered to do, or are guilty of arbitrary, wanton, or oppressive conduct, they render themselves liable. The action here is not brought upon the contract. It is in the nature of an action on the case according to the old system of pleading. The defendants were not acting within the scope of their authority, when they arbitrarily took possession of the school house and persistently refused to let plaintiff complete his contract. Had

the suit been brought upon the contract, it is clear enough that no personal judgment could have been rendered against the defendants. They might have refused to pay, and although their defense might have been perfectly groundless, and they might have been entirely mistaken in their proceedings, as they were acting officially, they would not have been personally responsible. But this is an action to recover damages for the wrong inflicted on the plaintiff, and for wantonly obstructing him in the performance of his duty. And when the plaintiff showed to the satisfaction of the trial court, that the defendants were guilty of the wrong complained of, I think he was entitled to maintain his action. I am therefore in favor of affirming the judgment.

The other judges concur, except Judge Adams, who did not sit.

NAT'L BANKING AND INS. CO., Plaintiff in Error, *vs.* FRED. KNAUP, Defendant in Error.

1. *Insurance Companies—Failure to affix common seal to Insurance policy.*—In the absence of any requirements to that effect in the charter, the failure of an Insurance Company to attach its common seal thereto will not invalidate a policy issued by the corporation.
2. *Demurrer—Final judgment—Review.*—The action of the trial court in overruling a demurrer, where no final judgment was rendered thereon, cannot be made the subject of review in the Supreme Court.
3. *Demurrer—Motion to strike out—How brought up.*—A demurrer and the action of the court thereon form a part of the record, and when the party stands upon his pleading it may be brought up without a bill of exceptions; but a motion to strike out, unless so preserved, forms no part of the record and cannot be carried up to the Supreme Court.

Error to Cole Circuit Court.

Lay & Belch, for Plaintiff in Error.

Edwards & Son, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action on the following instrument of writing: "$750. For value received in policy No. 1, dated the 23rd day of October, 1865, issued by National Banking and Insurance Company, I promise to pay said company the sum of seven hundred and fifty dollars in such proportions, and at such time or times, as the directors of said Company may agreeably to their act of incorporation require.

F. KNAUP."

The defendant filed an amended answer setting up several different and distinct defenses. The plaintiff demurred to the answer, and the demurrer was sustained to all the defenses except the first and second.

The first defense alleged, "that the plaintiff was not authorized nor empowered by the said act of the general assembly of the State of Missouri, approved January the 8th, 1863, creating it a body politic and corporate, to make insurance under the mutual division (thereof) upon the said City Hotel, the property of the defendant, and therefore, the said pretended policy of insurance in the plaintiff's petition mentioned was and is void."

The second defense set forth the 8th section of the act of incorporation, separating the insurance department of the company into two divisions, called respectively the joint stock division and mutual division; that under the mutual division, under which the policy and note were made, no power was given to insure the defendant's property—the City Hotel; that the plaintiff wrongfully and without any authority assumed to issue said policy, without the common seal of plaintiff being thereto affixed, and that said note was given solely in consideration of said policy, and is without consideration and void.

The plaintiff filed a replication to these two defenses, which on motion was stricken out by the court, and the clerk recites that the plaintiff excepted. But there was no bill of exceptions signed or filed to this action of the court.

The record then recites, that the plaintiff offered to read the

act of incorporation, but there was no bill of exceptions preserving any of the evidence, and the act of incorporation is not copied into the record.

At the next term of the court, a judgment was entered up *nunc pro tunc* as of the previous term in favor of the defendant. The plaintiff then filed a motion in arrest of the judgment, alleging as reasons therefor that the demurrer to the first and second defenses was improperly overruled, and that the motion to strike out the replication was erroneously sustained.

This motion was overruled, and to this action of the court a bill of exceptions was duly signed and filed.

1. The first and second defenses demurred to amounted to the same defense; that is, that the company had no authority to issue the policy, which formed the consideration of the note sued on. If the authority existed to issue the policy, it would have been good without the common seal of the company unless the charter required such seal to be affixed. But the power to issue it in any shape is denied in each of these defenses, and they constitute a complete bar to plaintiff's recovery. The demurrer was therefore properly overruled; but the plaintiff did not stand on it, and there was no final judgment on it.

2. As there was no bill of exceptions filed to the action of the court in striking out the replication, we cannot pass upon this point. The difference between a demurrer and a motion to strike out is, that the demurrer, and the action of the court on it, form a part of the record proper where the party stands on it. But a motion to strike out a pleading does not become a part of the record, unless it be preserved by a bill of exceptions.

Judgment affirmed. The other judges concur.

A. M. Blunt, Defendant in Error, *vs.* A. & P. R. R. Co., Plaintiff in Error.

1. *Justice's court—Appeal—Purpose of—May be shown by motion in appellate court.*—The effect of an appeal to the Circuit Court, without anything further, amounts to a full appearance to the action in the Circuit Court. But the appellant is allowed by motion in the Circuit Court to demonstrate the purpose of his appeal.
2. *Justices' courts—Appeals from—What errors noticed in appellate court.*—In appeals from a justice of the peace the Supreme Court will only pass upon such errors as were brought to the attention of the court below.

Error to Webster Circuit Court.

Baker & Litton, for Plaintiff in Error.

W. A. Lowe, for Defendant in Error.

Adams, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace. The writ of summons was directed to and served by the sheriff of Webster county. The defendant failed to appear, and a judgment by default was rendered against it. The defendant in due time by its attorney appeared only for the purpose of filing a motion to set aside the judgment by default, on the ground that the justice had no jurisdiction over the defendant, because the process was not legally issued and served.

The justice overruled this motion, and the defendant appealed to the Circuit Court. In the Circuit Court the defendant again appeared, but only for the purpose of filing a motion to dismiss the cause, because the summons had been directed to and served by the sheriff. This motion was overruled, but no exception was saved to this action of the court. The defendant failed to appear to the action, and judgment was rendered in favor of the plaintiff.

The defendant afterwards filed a motion in arrest for the same grounds, appearing only for that purpose; but the action of the court on this motion was not saved by a bill of exceptions.

The statute declares, that when an appeal is allowed and the return of the justice is filed in the clerk's office, "the court shall be possessed of the cause and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice." (Wagn. Stat., 849, § 13; 23 Mo., 400.)

The effect of an appeal to the Circuit Court, without anything further, amounts to full appearance to the action in the Circuit Court. But the appellant is allowed by motion in the appellate court to demonstrate the purpose of his appeal, which was done in this case. This motion however was overruled.

As no exception was saved to this action of the court, the defendant must be presumed to have acquiesced in it. In appeals from a justice of the peace, we can only pass upon such alleged errors as were brought to the notice of the court below.

The action of that court upon motions can only become a part of the record by a bill of exceptions.

Judgment affirmed. All the judges concur.

W. G. GRAY, Appellant, *vs.* W. H. BURDEN, *et al.*, Respondents.

1. *Arbitration—Award—Bond to abide—Suit upon—Assignment of breaches.*—In an action brought upon a bond given to abide the award of arbitrators, the petition set forth the bond, and alleged the appointment of the arbitrators and submission of the matters in dispute to them; the award of a sum of money; demand thereof and part payment by the principal and his refusal to pay the remainder; for which sum the petition prayed judgment. Petition held under our code to be substantially good. The refusal of defendant to pay the sum awarded was the breach of the bond, and this breach was properly assigned.

Appeal from Greene Circuit Court.

J. P. Ellis, for Appellant.

I. The award became a cause of action without judgment

thereon. (2 Greenl. Ev., 68.) Our statute does not require a judgment upon the award; it only permits it. (Valle vs. N. Mo. R. R. Co., 37 Mo., 445.) And our courts recognize the common law effect of an award as defined by Greenleaf. (Hamlin vs. Duke, 28 Mo., 166; Bowen vs. Lasalere, 44 Mo., 383.) And the bond itself requires the defendants to pay the award and not a judgment thereon.

II. No demand was required to be made of the sureties. They became liable upon the refusal of their principal.

III. Objection is raised that there is no specific breach assigned in petition. The condition of the bond is, that Burden shall pay the award, and the breach assigned is the non-payment of the award.

IV. It is objected, that said petition does not allege any specific damage sustained by plaintiff, by reason of any alleged breach of the condition of said bond. We suppose the point of this objection is, that the petition does not say that "plaintiff has been damaged in the sum of $335.74," and does say, "that the balance of said award is the sum of $385.74, with interest, which is yet due the plaintiff and unpaid." These allegations are substantially the same. We are not required to use technical language in pleadings under the code. (2 Wagn. Stat., 1013, § 3; Ahern vs. Collins, 39 Mo., 145; Ladd vs. Clark, 42 Mo., 519.)

V. The only statutory requirement regarding the bringing of actions on bonds conditioned upon the payment of money, is in section 1, viz: the plaintiff shall set out the condition and assign the breaches thereof. (Wagn. Stat., 239, § 1.)

McAfee & Phelps, for Respondent.

The plaintiff does not aver that arbitrators were selected by the parties to the agreement for the arbitration; nor who they were; nor, that they were duly qualified; nor, that the parties to the alleged arbitration were notified of the time and place of meeting, or attended said arbitration; nor, that the arbitrators made an award, and which was in writing, and attested by a subscribing witness. (1 Wagn. Stat., 143, § 6.) The

plaintiff has not alleged that any legal award was made by any arbitrators against Burden, and if he has not set out or pleaded a legal and valid award, such as can be sustained, he has no cause of action.

ADAMS, Judge delivered the opinion of the court.

This was an action on a bond to abide the award of arbitrators. The defendants demurred to the petition, and the court sustained the demurrer and rendered final judgment thereon in favor of the defendants.

The petition was as follows: "Plaintiff states that heretofore, viz: on the 25th day of August, 1871, the defendants executed to plaintiff their certain writing obligatory herewith filed, by which they promised to pay plaintiff the sum of four thousand dollars upon the following conditions, viz: Whereas, there are unsettled partnership accounts between W. H. Burden and W. G. Gray, to-wit: the partnership accounts of the firm of W. G. Gray & Co., and Burden & Gray, and whereas, said parties have this day entered into an agreement for the arbitration of said partnership matters: Now if said W. H. Burden shall, in all particulars, abide the award of said arbitrators, and pay any and all sums ordered by said award against said Burden, then this obligation to be void, otherwise to be and remain in full force; that said award was on the 5th day of October, 1871, made by the arbitrators appointed under said submission; that said award ordered said W. H. Burden to pay said plaintiff the sum of $1,135.74; that on the 14th day of October, 1871, the plaintiff demanded said sum of the said Burden, but the said Burden refused and neglected to pay the same or any part thereof to plaintiff; that on the 16th day of October, 1871, the said Burden paid plaintiff on said award the sum of $800.00; that the balance of said award is the sum of $335.74 with interest, which is yet due the plaintiff and unpaid; wherefore, he prays judgment on said writing obligatory for the said sum of $335.74, with interest and such other relief as may be proper."

The demurrer assigned the following causes: that the peti-

tion does not state facts sufficient to constitute a cause of action against defendant, in this; said petition, does not aver that any matter was submitted to arbitrators in pursuance of the provisions of said bond; said petition does not aver that any judgment has been rendered upon the said award, or that the same is obligatory upon said defendants; nor is it averred, that said other defendants have refused to pay said award; that the petition does not assign the specific breaches of the conditions of said bond, as required by law; said petition does not allege any specific damages to him being sustained by plaintiff, by reason of an alleged breach of the conditions of said bond.

This demurrer appears to be based merely on technical grounds. Under our code of practice, the petition is substantially good. It sets forth the bond which was given by the defendant, Burden, to abide the award of arbitrators; that the arbitrators were appointed and the matters in dispute submitted to them, and that they awarded to plaintiffs a sum of money, which was demanded of the principal, Burden, and he refused to pay the amount awarded, but paid a part of it and failed to pay the balance. The only breach of this bond that could be alleged, was the non-payment of the sum of money awarded to the plaintiff. The bond was given to abide the award, and the failure and refusal by Burden to pay the sum awarded was a breach of the bond, and this breach was properly assigned.

Under this view, the judgment must be reversed and the cause remanded. All the judges concur.

PACIFIC RAILROAD, Plaintiff in Error, *vs.* THE COUNTY COURT OF FRANKLIN COUNTY, Defendant in Error.

1. *Practice—Sup. Court—Refusal to prosecute—Voluntary dismissal—Effect of.*—Where a plaintiff refuses to prosecute his suit, and judgment of dismissal for want of prosecution is rendered, it amounts to a voluntary dismissal on his part as he is no longer in court for any purpose.

Error to Franklin Circuit Court.

Baker & Litton, for Plaintiff in Error.

Seay & Kiskaddon, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an application for a mandamus to be issued to the County Court, to allow the plaintiff an appeal from its decision in regard to the proper mode of taxing the plaintiff.

When the petition for the mandamus was filed, the plaintiff at the same time filed a motion for a change of venue, which was overruled, and to this ruling the plaintiff excepted. The plaintiff then refused to prosecute the case any further, and the court entered a judgment of dismissal for want of prosecution. The plaintiff filed a motion to set aside the judgment of dismissal, which the court overruled and plaintiff excepted.

Where a plaintiff refuses to prosecute his suit, and judgment of dismissal for want of prosecution is rendered, it amounts to a voluntary dismissal on his part, and he is no longer in court for any purpose.

Whether there was error or not in the previous proceedings, cannot be inquired into by us.

Judgment affirmed. The other judges concur.

DANIEL W. GORMAN, ADM'R OF J. BARLOW, dec'd., Defendant in Error, *vs.* JAS. B. AUST AND WIFE, Plaintiffs in Error.

1. *Chancery—Jury may pass upon issues.*—In chancery cases the court may take the opinion of a jury on issues to be framed for that purpose.
2. *Practice, civil—Motion for new trial—What must be embraced in.—Semble,* that propositions of law or fact, not embraced in the motion for a new trial, will not be considered by the Supreme Court.

Error to Morgan Circuit Court.

A. W. Anthony, for Plaintiffs in Error.

Ross & Spurlock, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action to enforce a vendor's lien for unpaid purchase money against real estate.

The parties seem to have treated it as an action at law, whereas, it was in the nature of a bill in chancery, and properly triable before the court; yet the case was submitted to a jury without objection by either party, and upon the evidence the jury found a verdict for the plaintiff, and the court afterwards made a decree or judgment for the amount found, and ordered the vendor's lien to be enforced. During the progress of the trial plaintiff read certain depositions, and, after they had been read, the defendants objected that the witnesses resided within forty miles of the place of trial. This objection was overruled, and the defendants excepted.

The defendants filed a motion in arrest, which was overruled, and the bill of exceptions states that they filed a motion for a new trial, which was overruled; but there is no such motion in the bill of exceptions. The bill of exceptions also contained numerous instructions, given and refused, which it is unnecessary to recite. In chancery cases the court may take the opinion of a jury on issues to be framed for that purpose.

There was no objection raised by either party to the submission of this case to a jury, and therefore we must regard it

merely as being submitted for their opinion. There seems to be nothing in the case which can lead to a reversal. There was no motion for a new trial raising any questions that had been passed on, either in regard to the admissibility, or weight, of evidence, or any other question.

There is nothing in the motion in arrest. The petition stated a good cause of action, and upon the whole record, as it stands here, the judgment must be affirmed.

Judgment affirmed. The other judges concur.

GEORGE W. STRICKLAND, Defendant in Error, *vs.* JOHN SUMMERVILLE, *et al.*, Plaintiffs in Error.

1. *Vendor's lien—No waiver of, where vendor retains title, etc.*—As long as the vendor retains the legal title to land, there can be no waiver of the lien for the unpaid purchase money. The title being in himself, he can retain it until he is fully paid; and the taking of other or additional security of itself is no waiver of the right. (Adams vs. Cowherd, 30 Mo., 458.)

Error to Jackson Circuit Court.

Ewing & Smith, for Plaintiffs in Error.

I. The taking of personal security was a waiver of the lien of the vendor. (Delassus vs. Poston, 19 Mo., 465; Gilman vs. Brown, 1 Mason, 191; Brown vs. Gilman, 4 Wheat., 255; White vs. Dougherty, Mart. & Yerg. 309; Mayham vs. Coombs, 14 Ohio, 428; Ducker vs. Gray, 3 J. J. Marsh., 163.)

II. But if there was a lien in the first instance, it was extinguished by the payment made by Jesse. Jesse borrowed money of Shoemaker and gave his note with Strickland as surety therefor. This money was paid to extinguish the original purchase note for the land. Jesse then became the debtor of Shoemaker. The purchase money was paid and how could there be a lien therefor? Strickland paid the note on which he was surety to Shoemaker for Jesse, and took an assignment of the note. By what principle of equity can it be insisted that

this note can be for the purchase money, or a vendor's lien declared therefor? There is no purchase money unpaid. The amount due plaintiff is no part of the purchase money. The fact that Jesse agreed verbally, two years after the sale to him, that the money for which he was indebted to plaintiff on account of the amount paid Shoemaker, should be paid before plaintiff was bound to make the deed under the original contract and sale, had no significance or bearing in the case. There was no consideration for such promise and the agreement is within the statute of fraud besides. The lien of a vendor can exist only for unpaid purchase money. (Meigs vs. Dimock, 6 Conn., 458.)

James K. Sheley, for Defendant in Error.

I. The title to the land was in Strickland, and he had the lawful right to hold the same till all the money Jesse had agreed to pay for the land was paid. Summerville having by his agreement procured the deed to be made, became liable to pay the debt and Strickland had a vendor's lien for the same. (Adams vs. Buchanan, 49 Mo., 64, and the cases there cited.)

II. As between the vendor and the vendee, and all persons purchasing with notice, a lien exists in favor of the vendor for the purchase money, unless the same shall be waived by the vendor. A waiver can only be by taking security other than the land. (Adams vs. Buchanan, *supra.*) Here the vendor never took a note with or without security; but looked only to the land for his money.

III. The sale was a mere verbal one, and no court of equity would have compelled him to convey until the whole of the purchase money had been paid. The undertaking of Summerville, to pay Strickland so much of the purchase money as he had agreed to pay Jesse, stamps it with the character of purchase money, and of itself created a vendor's lien.

Adams, Judge, delivered the opinion of the court.

This was an action for a balance of purchase money for

the sale of a tract of land in Jackson county, and for the enforcement of a vendor's lien against the land. The evidence was contradictory, but the preponderance of the testimony shows the leading facts to be, that the plaintiff made a verbal sale of the land to one Jesse, who took possession and borrowed some money to pay for the land, and gave his negotiable note for the same which the plaintiff indorsed and had to pay; that Jesse afterwards sold the land to the defendant Summerville, and plaintiff agreed to make Summerville the deed, provided he would pay the balance of the purchase money; and the deed was accordingly made with that understanding. Summerville afterwards sold and conveyed the land to the defendant Lattimore, who purchased with notice of plaintiff's claim.

The question of waiver of the vendor's lien does not apply to this case. As long as the vendor retains the legal title there can be no waiver of the lien for the unpaid purchase money. The title being in himself, he can retain it till he is fully paid, and the taking other or additional security of itself is no waiver of this right. (Adams vs. Cowherd, 30 Mo., 458.) A vendor retaining the legal title is in a very different situation in regard to the land sold, from one who has made an absolute title without reserving in the deed any lien for the unpaid purchase money. Therefore, there can be no question about the retention of the lien so far as Jesse was concerned, and in regard to Summerville, he expressly agreed to pay the balance claimed by plaintiff, and there is no pretense that there was any waiver of the plaintiff's right subsequent to the conveyance to him. As Lattimore took his conveyance with notice, the land in his hands is subject to the plaintiff's lien.

Judgment affirmed. The other judges concur.

Jos. H. Rankin, *et al.*, Defendants in Error, *vs.* Pacific R. R., Plaintiff in Error.

1. *Carriers—Delay in delivering goods—Measure of damages.*—In an action of damages for delay in delivering goods, *held*, that although the goods at the time of delivery may have been valueless to plaintiff for the purpose for which they were bought, they could not recover for a total loss. The measure of plaintiff's damages would be any necessary expenses incurred in obtaining the goods, together with the difference between the cost of the goods and what could have been realized for them at the time and place of destination, if the amount were less than cost. If greater, there would be nothing to add or deduct.
2. *Railroads—Notice of delivery by.*—Where goods are delivered on time by a railroad, the company is not compelled to notify the consignee of their arrival at the depot.
3. *Common carriers—Delivery of goods by—Delays as to.*—It is the duty of common carriers in all cases to transport without unnecessary delay all goods received for carriage, whether they are intended for a particular purpose or not.

Error to Morgan Circuit Court.

Litton and Ewing & Smith, for Plaintiff in Error.

I. The second instruction given for plaintiff is erroneous. A man cannot compel the carrier to buy his goods, simply because there may have been an unreasonable delay. This is well settled. (2 Redf. Railw. p. 167, § 175, note 2; Briggs vs. N. Y. Cent. R. R., 28 Barb., 515; Redf. Car., § 3, 14; Ang. Car., § 490*a*; Scoville vs. Griffith, 12 N. Y., 509; Sedg. Dam. [3 Ed.], 376 § 359, and n.; Hackett vs. B., C. & M. R. R., 35 N. H., 390; New Orleans R. R. vs. Tyson, 46 Miss., 729; Shaw vs. S. C. R. R. Co., 5 Rich. [S. C.], 462; Tucker vs. P. R. R., 50 Mo., 386.)

Again, said instruction is erroneous in stating that in addition to the value of the delayed goods the plaintiffs are entitled to recover, "whatever amount of money they have expended in trying to recover the same, and interest." This is wrong because the plaintiffs are not entitled to any money spent by them. (See Ingleden vs. Northern R. R. Co., 7 Gray, 86; Miss. Central R. R. Co. vs. Kennedy, 41 Miss., 671.)

If plaintiffs be entitled to any money spent, it could only be

to the amount necessarily or reasonably spent. (See Ang. Car., § 490*a*.)

The instruction is also erroneous in saying that it was the defendant's duty to notify plaintiffs of the arrival of the goods, or to notify their legally authorized agent. (Neal vs. Wilmington R. R. Co., 8 Jones' Law [N. C.], 482; New Orleans R. R. vs. Tyson, 46 Miss., 729; Morris R. R. vs. Ayres, 5 Dutch., 393; Farm. and Mec. Bank vs. Champlain Transfer Co., 23 Vt., 186; Norway Plains Co. vs. Boston & M. R. R., 1 Gray, 263.)

II. The first instruction for plaintiff was erroneous. It made no difference if the goods had become valueless to plaintiff, if their general market value was unimpaired. Defendant was only concerned with market values, not the special uses to which the plaintiff may have intended to put the articles, of which it had no notice.

Pemberton & Wray, and Stover & Neilson, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action against the defendant as a railroad common carrier, for non-compliance with a contract of affreightment. The goods consisting of house castings intended to be put in a brick house then being erected by plaintiff at Versailles, fifteen or twenty miles from Tipton, were shipped at Boonville, Missouri, to be carried by defendant to Tipton, about twenty-six miles.

The goods arrived at Tipton the same day they were shipped, but by the carelessness of defendant's agents, were left in the car and went on through to St. Louis, where they remained for several days, and were not delivered at Tipton till twelve days after the time they should have been delivered. When delivered at Tipton they were in the same condition as when shipped. The plaintiff had sent several times for the goods before they were delivered, at an expense of five dollars per trip. When they were delivered at Tipton, the defendant's freight agent at its depot received them, and on the next day

delivered them to McCoy & Co. commission merchants, who paid the freight and took charge of the goods for the plaintiff. The evidence tended to show that McCoy & Co. were the plaintiffs' agents as commission and forwarding merchants.

There were three counts in the petition all on the same contract of affreightment for the transportation of the same castings. The first count charged, that by means of the carelessness of defendant in the transportation of the goods, they were wholly lost to plaintiff. The second count was similar to the first, charging that the goods were not delivered in a reasonable time, or in any other time, and were wholly lost to plaintiff. The third count charged that the goods were intended for a house then being erected by the plaintiffs; and were so unreasonably delayed in the transportation, that when delivered to plaintiffs they were valueless for the purpose for which they were bought, and only worth $10, the price of old iron. The plaintiffs charged that by reason of such delay in transportation, they were compelled to expend seventy dollars in sending and searching for the goods. The answer denied the material allegations of the petition. Upon the trial the evidence tended to show that the manufacturer's price of the castings were about $102, and that they would be valueless to plaintiffs, but might be used for another house of the same dimensions. There was no evidence to prove what the market or other value was, at the place of delivery. There was no notice given by defendant to the plaintiff of the delivery of the goods at Tipton. This in substance was all the testimony. Each party asked several instructions, some were given and others refused.

I shall only notice such as present the point relied on here for a reversal. By the third instruction given for plaintiffs, it was declared "that if the jury believe from the evidence that defendant received the goods in controversy, at the place, and to be delivered at the place charged in the complaint in a reasonable time, and that the goods were received at the place of delivery out of time, by the agent and at the depot

of defendant, then it was the duty of defendant to notify plaintiff of such arrival or their legally authorized agent to receive the same, and that a failure to give such notice, renders the defendant liable for whatever damages may accrue to plaintiff; and the rule for estimating the plaintiffs' damages should be as stated in the plaintiffs' first instruction."

The first instruction referred to was refused; but the rule for estimating the damages in that instruction which is made a part of the third instruction above copied, is "that if by such failure to carry and deliver the said goods they were rendered valueless to plaintiffs, then the plaintiffs were entitled to recover the value of said goods at the place of destination together with whatever amount of money they have expended in trying to recover the same, with six per cent. interest from the time they should have been delivered."

The second instruction given for plaintiffs entirely ignores the delivery of the goods, but lays down the rule for estimating the damages in the same way as the third. The second and third instructions asked by the defendant and refused by the court were to the effect, that in the absence of any notice to defendants from plaintiffs at the time of the shipment, that there was a necessity for punctual transportation and delivery of the goods, the defendant would not be liable for the delay which occurred in the delivery. The third instruction asked by defendant and refused, was to the effect that although the goods did not arrive in time, yet if they were in good condition and were received by the plaintiffs or their agents, the plaintiffs were only entitled to recover whatever they may have necessarily expended in time and money in endeavoring to get the castings.

The jury found a verdict for $128.86, on which judgment was rendered for plaintiffs. Motions for new trial and in arrest, saving the points passed upon, were duly made and overruled and exceptions saved. It is manifest from this statement, that the whole contest was on the third count of the petition which admitted the delivery of the goods, but charged that they were so unreasonably delayed that they were of no use or

value to plaintiffs, and they were put to expenses in going for the goods before they were delivered at the depot. There was no pretense that the goods were lost in the transportation, which seems to be the gravamen of the first and second counts. If they had been lost and not delivered at all, the plaintiffs would have been entitled to the full value with all necessary expenses they had been put to, in endeavoring to recover them. But as they were not lost, but delivered out of time, what must be the rule of estimating the damages? Can the plaintiffs recover as though there had been a conversion, regardless of the value of the goods which they still retain? Although the goods at the time of delivery may have been valueless to the plaintiffs, for the purposes for which they were bought, still they may have been of a greater or less market value, and whatever they could have realized in money out of the goods at their place of destination, ought to have been taken into consideration in estimating the damages. They cannot recover as for a total loss. (Briggs vs. New York Cent. R. R., 28 Barb., 515; Ang. Car., § 490*a*; Scoville vs. Griffith, 12 [N. Y.], 509; Sedg. Meas. Dam., 376.) So in regard to the plaintiffs' expenses in recovering the goods. The rule is not what they may have expended; but what they were necessarily compelled to expend in such recovery. (Ang. Car., § 490*a*.)

The rule in respect to notifying consignees of the arrival of goods does not apply to railroads, where the goods are delivered on time. They are not required as carriers by wagon to deliver at the place of business or house of the consignee; nor as carriers by water, to notify the consignee of the arrival at the wharf. Their route is confined to the track, and the delivery must be at a depot or by the roadside, and if there be no one to receive them they may store them without charge for a reasonable time till the consignee calls for them. It is the duty of a consignee to do so without notice, as the usual certainty of the arrival of the train renders such notice unnecessary. (See Morris & Essex R. R. Co. vs. Ayres, 5 Dutch., 393; Norway Plains Co. vs. Boston & M. R. R. Co., 1 Gray, 274.)

Where goods are unreasonably delayed in the delivery at the depot, it might be necessary to notify the consignee of their arrival. But in this case the question becomes unimportant, because the goods were delivered soon after the arrival, and no damage was proven to have accrued after the arrival and before the delivery to the consignee's agent. For these reasons the instructions given for plaintiffs on the question of damages were erroneous. The instructions of defendants, requiring notice to them that a punctual delivery of the plaintiff's goods would be demanded, were manifestly erroneous and therefore properly refused. It is the duty of common carriers in all cases to transport without unnecessary delay all goods received for carriage, whether they are intended for a particular purpose or not. The defendant's instruction reciting that an unreasonable delay in transportation of the goods, if delivered in good order, only entitles the plaintiffs to recover what they necessarily expended in obtaining the goods was properly refused. It did not assert the correct rule for estimating the damages. To the amount necessarily expended there should be added the difference between the cost and what could have been realized at the time and place of destination, if less than the cost; if greater, there would be nothing to add or deduct.

Judgment reversed and cause remanded. All the judges concur.

RUFUS, LOU, and JOSEPH M. PELKINGTON, Plaintiff in Error, *vs.* THE NATIONAL INSURANCE CO., Defendant in Error.

1. *Insurance—Additional—Written indorsement—Agent—Notice to—Estoppel in pais.*—Where it was made the express condition of a contract of insurance that, if the assured should make any other insurance on the property without the written consent of the company indorsed on the policy, he should recover no insurance thereon, and it appeared that the agent was duly notified of such additional insurance and made no objection, *held*:

1st. That notice to the agent was notice to the company.

2nd That upon such notice, in the absence of any dissent, the company would be presumed to have waived the written indorsement and would be bound. By its conduct in the premises it would be estopped from setting up the want of the indorsement as a defense to the policy.

Error to Pettis Circuit Court.

Phillips & Vest, for Plaintiffs in Error.

I. In Hayward vs. Nat. Ins. Co. Han. (52 Mo., 181,) the case of Hutchins vs. The Western Ins. Co., 21 Mo., 97, has been overruled, and the equitable rule has been established, that the condition in the policy may be waived by the company, and that the waiver may be made as well by acts as by positive declarations, and that the Company may be estopped from setting up the want of indorsement by its course of dealing under the circumstances. In Geib vs. The International Ins. Co., 1 Dill. Ct. Ct. R., 449, Judge Dillon says, "As the local agent might, by contract indorsed on the policy, have waived the condition as to the amount to be insured, he may, by acts and by course of dealing, do that which amounts to such a waiver; may dispense with this condition and with the requirement that such waiver or dispensation shall be in writing indorsed on the policy." This rule has been since approved by the Supreme Court of the United States in the case of "The Distilled Spirits," 11 Wall., 356; see also Viele vs. Germania Insurance Co., 26 Iowa, 9; Peoria M. & F. M. Ins. Co. vs. Hall, 12 Mich., 202.

Crandell & Sinnett, for Defendant in Error.

I. The subsequent insurance wrought a forfeiture of the policy sued on, and oral waiver is not sufficient to revive it, unless some new consideration on part of assured supervenes. There is no pretense of new consideration in this cause. (1 Phil. Ins., §§ 1040, 2155; Cockrell vs. Cin. Ins. Co., 16 Ohio, 149; Turrell vs. Thomas, 5 Bingh., 188.) The forfeiture of a claim under a policy, incurred by deviation, may be waived in writing, but not by a merely verbal consent to waive it after it has occurred. (3 Johns. Cas., 142; 1 Sumn. C. C., 232.)

The doctrine in some late cases that there may be a parol waiver of prior or subsequent insurance, if communicated at time of, or before, making the policy, is based upon the fact, that the premium is accepted with full knowledge of the facts and that the contract is made with reference to the facts stated. In the case at bar the subsequent insurance was made in violation of the contract of insurance then in existence, and knowledge thereof by parol was given after the contract was forfeited with no new consideration between the parties, or indorsement on the policy. Here the doctrine of oral waiver can have no equitable or legal application. Defendant had the perfect right to refuse written consent to the subsequent insurance. The forfeiture of the policy is the result of plaintiffs' act in violating the contract. The wrong, if any, is imputable to plaintiffs' own unwarranted violation of the policy, and not to defendant's neglect or refusal to consent thereto. (21 Mo., 97; 4 How., 222; Forbes vs. The Aganaw Ins. Co., 9 Cush. 470; Barrett vs. Ins. Co., 7 Cush., 178; Carpenter vs. Ins. Co., 16 Pet., 512.)

The case of Hayward vs. Nat. Ins. Co., 52 Mo., 181, modifies to some extent the doctrine held in Hutchinson vs. Western Ins. Co., 21 Mo., 97; but the acts and circumstances connected with the transaction in that case are so different from the facts set up in the case at bar, that it would require an unwarrantable stretch of law to apply the principle of estoppel therein enumerated to this case. In the Hayward case the facts clearly show that it was well understood between the insured and the insurance agent, at the time of the issuing the policy of $3000 sued on, that $6000 was to be kept on the insured property. In the case at bar, the policy sued on was issued without any understanding or notice whatever, that plaintiffs intended to take out any further insurance on the property. There is no averment in the pleadings that at any time plaintiffs presented the policy sued on to the agent for the proper indorsement, or that they gave any consideration for such indorsement or waiver; or that defendant, by its agent or otherwise, gave actual consent to such additional insurance; but they rely wholly upon the fact,

that, at the time they notified the agent of the subsequent insurance, he did not object and notify them that their policy was annulled.

There is no estoppel in this case. Bigelow on Estoppel, page 480, says: 1st. "There must have been a representation or a concealment of material facts: 2nd. The representations must have been made with a knowledge of the facts: 3rd. The party to whom it was made must have been ignorant of the truth of the matter: 4th. It must have been made with the intention that the other party should act upon it: 5th. The other party must have been induced to act upon it."

Here plaintiffs with full knowledge of the conditions of the policy, and, without notice to defendant, take out another policy in another Company. After their second policy had been taken, and the contract between plaintiffs and defendant had been forfeited by the acts of plaintiffs, they notify defendant's agent of their acts, and because he makes no reply, they claim that defendant is estopped from setting up their violation of the contract to defeat this action. Why should the defendant object? It is too late for objections; the injury is done, the policy vitiated, and it is entirely optional with the defendant, whether the policy shall be restored or not, and its failure to make the proper indorsement on it to give it new life is the strongest evidence that it was considered void from that time by defendant, and it seems to have been treated as such. Now we ask, where is the representation? Where the concealment? Where is the intention shown to do a wrong? What has defendant done to induce plaintiffs to act contrary to their interests? (See Corning vs. Troy Nail Factory, 39 Barb., 311.) For further authorities on the doctrine of estoppel, see Shaw vs. Spencer, 100 Mass., 382; Hopper vs. McWhorter, 18 Ala., 229.

But the Hayward case was not intended to cover such a case as this. Vories, J., in giving the opinion of the court, says: "I do not say that the fact that Lennon told Eby after he had taken the last policy, that he had given the risk to another Company, would have been sufficient of itself to constitute a

waiver of the condition in the policy in question, but this fact, taken in connection with all the other facts connected with the transaction, I think, is sufficient." The doctrine enunciated in the case of Hutchison vs. Western Ins. Co., 21 Mo., 97, must govern this case.

WAGNER, Judge, delivered the opinion of the court.

When the court struck out the replication to the defendant's answer, the plaintiffs took a non-suit, and, failing to have the same set aside, they have sued out their writ of error.

The petition was on a policy of insurance issued by the defendant, and the answer, by way of new matter and in avoidance of the action, stated as a special defense, that "it was an express condition of said policy, that if the assured should have, or shall hereafter make, any other insurance on the property hereby insured or any part thereof without the written consent of the company indorsed upon the said policy, * * * * then the assured shall not be entitled to recover from the company any loss or damage which may occur in or to the property hereby insured, or any part or portion thereof. There was then an averment, that plaintiffs did take insurance from the Lamar Ins. Co. for $1,500 on the property insured by defendant, after the same had been insured by the defendant, and that, the written consent of defendant thereto was not indorsed upon the policy sued upon, for which reason it was claimed, that the policy was forfeited, and no recovery could be had thereon. The reply admitted, that the policy contained the condition set up as a special defense, and also admitted, that the written consent of the defendant to the making of the additional insurance was not indorsed upon the policy; but it alleged, that the indorsement was not made by reason of the fact that defendant, by its agent, who had full authority from defendant for so doing, waived the performance of said condition, and, after being notified by plaintiffs of said additional insurance, failed and neglected to make the indorsement on the policy, and that said agent, after being duly notified of the additional insurance, assented thereto.

The court, by its ruling in striking out the replication, vir-

tually decided that it was absolutely necessary to obtain the written indorsement of the company's assent to the additional insurance, before any recovery could be had. There are cases which undoubtedly sustain this position, but the tendency of the modern decisions is to relax and modify this stringent doctrine.

It is emphatically averred, that the agent was duly notified of the subsequent and additional insurance, and assented to the same. Notice to the agent was notice to the principal, and the company was bound by that notice. After the company was notified, and made no objection, the assured had the right to suppose that it acquiesced and still continued the policy. This very question was passed upon in Hayward vs. Nat. Ins. Co., 52 Mo., 181 in construing the same condition in this company's policies, and it was there held, that, where the agent was notified of the additional insurance, the company was bound by such notice, and in the absence of any dissent a waiver of the written indorsement would be presumed. The case of Horwitz vs. Equitable Mut. Ins. Co. (40 Mo., 557) is also in point. In that case, the company sought to avoid its liability under a similar clause in its policy because there was no written indorsement of a subsequent and additional insurance, but it was decided that it was the duty of the company, upon being notified of the additional insurance, to indorse the same upon the policy of the assured or to notify him of the refusal of the risk, and that, having failed to do so, it would not be permitted to set up as a defense the failure to have such additional insurance indorsed upon the policy. When the assured has notified a company that he has procured additional insurance, it is the duty of the company, if it does not intend to be further bound or to continue the risk, to express its dissent, and not allow the party to repose in fancied security to be victimized in case of loss.

It is unconscientious to retain the premium and affirm the validity of the contract whilst no risk is imminent, but, the very moment that a loss occurs, to then repudiate all liability and claim a forfeiture. If the indorsement is not

made upon notice duly given, a waiver will be presumed in, the absence of any dissent. If a party by his silence directly leads another to act to his injury, he will not be permitted, after the injury has happened, to then allege anything to the contrary, for he, who will not speak when he should, will not be allowed to speak when he would.

The judgment should be reversed, and the cause remanded. The other judges concur.

JNO. W. BROWN, Adm'r of the Estate of THOMAS KIRKPATRICK, deceased, Plaintiff in Error, *vs.* E. L. FOOTE, *et al.*, Defendants in Error.

1. *Practice, civil—Dismissal—Reinstatement.*—After the dismissal of a cause, it is competent for the court during the same term to reinstate the case.
2. *Motion—When part of the record.*—A motion is no part of the record unless made so by a bill of exceptions.

Error to Johnson Circuit Court.

Pickerell & Blackford, for Defendants in Error.

Ladue & Fyke, for Plaintiff in Error.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the Henry County Court of Common Pleas, brought by Thomas Kirkpatrick against E. L. Foote and others, composing the firm of Foote & Heller, for goods, wares, &c., sold and delivered to said firm. Kirkpatrick having died, the action was revived in the name of his administrator, the present plaintiff, John W. Brown. After such revivor the parties announced themselves ready for trial, and a jury was impaneled, but the plaintiff for some cause did not proceed, nor offer any evidence in support of the allegations of his petition. The jury was discharged, the cause dismissed, and a judgment for costs rendered in behalf of the defendants. At the same term, at which the order of dismissal was entered.

the cause was on motion of plaintiff reinstated on the docket at the costs of the plaintiff. It was perfectly competent for the court to make such an order, as every thing is in the breast of the court during the term, and this order certainly operated to set aside any judgment for costs which had been rendered in favor of the adverse party. Besides, the record shows that the defendants appeared at the time the order to reinstate was made, and saved no exceptions; and this clearly was a waiver on their part, and they could not afterwards be heard to object.

At the next term a change of venue was granted defendants, on their application, to the Circuit Court of Johnson county. When that court became possessed of the cause, the defendants appeared and moved the court to dismiss the cause.

This motion was sustained and the cause dismissed. What the grounds of that motion were, we are left to conjecture, for a motion, as has been time and again decided by this court, is no part of the record unless incorporated in a bill of exceptions. (London vs. King, 22 Mo., 336; State vs. Batchelor, 15 Mo., 208; 10 Mo., 457; Christy's Adm'r vs. Meyers, 21 Mo., 112.)

And, although the clerk has copied the alleged motion in the transcript, we cannot notice it for the above stated reasons.

The plaintiff filed no motion to reinstate the cause after it was thus dismissed, nor did he preserve by a bill of exceptions the motion filed by the defendants.

Under these circumstances, it is utterly impossible for us to examine into the correctness of the action of the court below however erroneous that action may have been; and the judgment of the court must therefore receive our sanction and be affirmed. All the judges concur.

THOMAS REED, Respondent, *vs.* THOMAS M. SNODGRASS, Appellant.

1. *Justice's Court—Set-off in excess of jurisdiction not allowed.*—In suit before a justice, defendant cannot introduce proof of set-off on an account which exceeds the jurisdiction of the justice, although by crediting plaintiff's demand upon it the claim is reduced within the limit of the jurisdiction.
2. *Justice—Defense of payment—Statement unnecessary.*—In suit before a justice defendant may prove payment without filing his statement thereof.

Appeal from Phelps Circuit Court.

Pomeroy & Miller, for Appellant.

C. C. Bland, for Defendant.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action instituted before a Justice of the Peace for money had and received to the amount of $120, credited however by the sum of $30 alleged to have been paid, thus reducing the amount within the jurisdiction of the justice, and a judgment was asked for the balance, $90. The defendant filed a set-off amounting in the aggregate to $142.90. Among the items of this account, was one for $30 "loaned" to the plaintiff. The account was credited with cash received the 11th and 24th of Dec. 1869—$120—and the balance which the defendant claims, as due him, was $24.90. The plaintiff in his statement of his cause of action charges the defendant with having received the money, $120, "on or about the 24th day of December, 1869."

On the trial of the cause in the Circuit Court, the plaintiff introduced evidence tending to establish his claim, but the court refused to permit the defendant to support his set-off by testimony, on the ground that such set-off exceeded the jurisdiction of the Justice of the Peace, by whom the cause was originally tried. The defendant excepted, withdrew his set-off, and thereupon offered to adduce testimony tending to show payment of the plaintiff's demand; but this also was denied, on the singular ground that no statement

of payment had been filed before the justice by the defendant, and exceptions to this ruling were also saved. Judgment was then rendered for the plaintiff, and the defendant, after an unsuccessful motion for a new trial, brings this cause here by appeal. As the defendant withdrew his set-off, it is not perhaps necessary to pass upon the correctness of the ruling which refused to admit evidence in its support. If, however, such necessity existed, the decision in the case of Almeida vs. Sigerson, 20 Mo. 497, would seem to resolve any doubt there might be in favor of such ruling. But the Court's action in refusing to admit testimony to show payment of the plaintiff's demand is utterly indefensible. In all proceedings before a justice of the peace, in the absence of any thing to the contrary, the defendant is always presumed to plead the general issue. (2 Greenl. Ev., §§ 135, 516.)

Judgment reversed and cause remanded. All the judges concur.

GEORGE KANE, Respondent, *vs.* CAROLINE F. McCOWN, Appellant.

1. *Attachments—Publication—Order of, when may be issued by clerk in vacation.*—Under the statute of January 14th 1860, touching attachments, the clerk of the Circuit Court has power to make orders of publication in all cases where the court should in term have made them; and this power is not limited to the vacation which precedes the first session after filing the petition.

2. *Attachment—Order of publication—Omission to designate newspaper—When not fatal.*—Under the practice act of 1855 (R. C., 1855, p. 1225, § 17) the omission of the clerk to designate in the order of publication the particular newspaper in which notice of suit shall be published, although an error, was not such an one as to destroy the judgment rendered thereon in a collateral proceeding.

3. *Executions—Sales under, after return day—Const. Stat.*—Under the act of March 23rd, 1863 (Sess. Acts 1863, p. 20), a sale under an execution theretofore levied may be made after the return day thereof.

4. *Execution—Handed over by sheriff to his successor—Sale may be completed by latter.*—The intention of the execution law of 1855, and that of 1865 (§§ 59,

63), was to require executions not completely executed to be handed over to, and completed by, the sheriff in office at the time of the sales.

5. *Conveyances—Corrections in open court—Acknowledgment of.*—Where a deed is corrected in open court, there would seem to be no necessity for a formal acknowledgment of the deed there corrected.

6. *Judicial sales held at church—Effect of.*—Where in consequence of the fact that a Circuit Court House was occupied by United States troops, a neighboring church at the same county seat was used as a court house, a judicial sale at the latter place would not be thereby rendered void. The obvious meaning of the execution law is to require judicial sales to be made at the door of the building occupied and used as a court house.

7. *Deed by sheriff to purchaser—Delivery not necessary, when.*—Where the deed to a purchaser at sheriff's sale is executed, acknowledged and recorded, and his title is decreed by the court to another, and the purchaser transfers to the other his rights under the purchase, no formal delivery by the sheriff to the purchaser is necessary; the law in such cases will presume a delivery.

8. *Supreme Court—Decisions of—What points should be reviewed.*—Although the decision of a single point in a case may determine the affirmance or reversal of the judgment in that case, it does not follow that the court may not proceed to examine and decide other points which the record presents.

9. *Attachment—Jurisdiction of court over property—Order of publication cannot be attacked collaterally.*—Where a writ of attachment is valid, conforming essentially and substantially to the requirements of the statute, and issued by the clerk in conformity with the power vested in him, the court obtains jurisdiction over the property, and although the order of publication be defective, the judgment of the court and sale of the property will not be thereby invalidated in a collateral proceeding.

10. *Attachment—Finding of court cannot be attacked collaterally.*—Where the record shows a finding of court, that there has been a legal order of publication and a publication in pursuance thereof, such finding cannot be attacked in a collateral proceeding by showing that there was no publication.

Appeal from Johnson Circuit Court.

Hicks & Nickerson, for Appellant.

I. The Circuit Court had no jurisdiction to hold courts at said meeting house, and its judgments, orders and decrees made thereat, without the appearance of parties and consent for trial or hearing, were void. (People vs. Northup, 37 N. Y., 205; People vs. Sanchez, 24 Cal., 20; Ross vs. Austin, 2 Cal., 183; People vs. Bradwell, 2 Cowen 447.) And it had no power to transfer the place fixed by law for the sale of real estate under execution to any other place.

II. The authority of clerk to make an order of publication was limited to the vacation next preceding the return term of the writ, as the court, at the return term of the writ, had full control and jurisdiction over the subject matter. The word "vacation," as used in this section, means the time intervening between the time of issuing the writ and the return day thereof. On the return day of the writ, the jurisdiction of the court commenced, and that of the clerk ceased. The act of January 14th, 1860, supplementary to an act to provide for suits by attachments of December 8, 1855, does not enlarge or restrain the jurisdiction of the court in making orders of publication. Both these acts must be taken and construed together.

III. If Christian executed the writ of execution by levying the same on the real estate in controversy, then it was his duty to have made the sale under the levy so made, notwithstanding his term of office may have expired before a term of the court was held at which a sale could have been made, and there was no warrant in the law for him to turn said execution over to his successor in office. See 62nd section of the execution law of 1855, page 749. But the cases of Dunnica vs. Coy, 28 Mo., 527; Carr vs. Youse, 39 Mo., 350; Larkey vs. Lubke, 36 Mo., 121; Merchants' Bank of St. Louis vs. Harrison, 442; show conclusively, that Christian made no such legal levy upon the land; that the writs remained in his hands unexecuted at the return term thereof, in October, 1864; that there was no levy made in the life-time of the executions; that they were *functi officio* when delivered to Williams on the 9th day of February, 1865. (Bank of Missouri vs. Bray, 37 Mo., 195.)

IV. The decree does not find that the sheriff's deed was delivered to Calhoun. Without delivery no title passed. (Barr vs. Schroeder, 32 Cal., 616.)

V. After the amendments and interlineations were made in the deed, it was not again acknowledged by the sheriff in open court. The requirements of the statute in this respect are imperative, and it has always been

considered, that an acknowledgment of a sheriff's deed in open court, and a certificate of the same, are essential to the validity of the conveyance. (Ryan vs. Carr, 46 Mo., 485; Allen vs. King, 35 Mo., 225; Thornton vs. Miskimmon 48 Mo., 222.)

Botsford & Johnson, for Respondent.

I. A call, made at the door of the building in which the Circuit Court is being held, is at the proper place for an execution sale. (1 Wagn. Stat., 609, § 42,) It would not be valid if made at any other place. (Merr vs. Bell, 45 Mo., 333.) The building, in which the Circuit Court is held, is in contemplation of law the court house.

II. The mis-recital and omission in the deed to Kane were clerical errors and immaterial, as the other recitals sufficiently identified the judgment. (1 Wagn. Stat., 612, § 54; Tanner vs. Stine, 18 Mo., 580; Steward vs. Severance, 43 Mo., 322; Buchanan vs. Tracy, 45 Mo., 437; Bank of Whitehall vs. Pettis, 13 Vt., 395; Armstrong vs. McCoy, 8 Ohio, 128; Perkins vs. Dibble, 10 Ohio, 433; Jackson vs. Young, 5 Cowen, 269.) But these errors are corrected by the sheriff by leave of the court. (Thornton vs. Miskimmon, 48 Mo., 219.)

III. The clerk had the power to issue the orders of publication after the return term in the same manner as before. (2 Wagn. Stat., 1008, § 13; Schell vs. Leland, 45 Mo., 289; Harris vs. Grodner, 42 Mo., 159; Moore vs. Stanley, 51 Mo., 317; Freeman vs. Robbins, 45 Mo., 315; 1 R. C., 1855, p. 245, § 23; Sess. Acts 1859–60, p. 4.)

And the finding of the court, that publication had been made according to law, cannot be disputed in a collateral proceeding. (Freeman vs. Thompson, 53 Mo., 183; Hardin vs. Lee 51 Mo., 241; Cooper vs. Reynolds, 10 Wall., 308; Voorhies vs. Bank U. S., 10 Pet., 449; Granger vs. Clark, 22 Maine, 128; Cook vs. Darling, 18 Pick., 393; Goudy vs. Hall, 30 Ill., 109; Thomson vs. Tolmie, 2 Pet., 169; Dingledine vs. Hershman, 53 Ill., 288; Elliot vs. Piersol, 1 Pet., 340; Peersley vs. Hays, 22 Iowa, 128.) But irregularity in, or even

want of, an order of publication will not render the sale void. (Hardin vs. Lee, 51 Mo., 241; Freeman vs. Thompson, 53 Mo., 183; Cooper vs. Reynolds, 10 Wall., 308; Satcher vs. Satcher's Adm'r, 41 Ala., 26; Williamson vs. Leland, 2 Pet., 657; Grignon's Lessee vs. Astor, 2 How., 319; Beauregard vs. New Orleans, 18 How., 497; Paine vs. Moreland, 15 Ohio, 442; Robb vs. Irwin, 15 Ohio, 698; Shelton vs. Newton, 3 Ohio St., 494; Benson vs. Cilly, 8 Ohio, 614; Rover Judicial Sales, § 75; Covington vs. Ingram, 64 N. C., 123; Alexander vs. Nelson, 42 Ala., 462; Dequindre vs. Williams, 31 Ind., 444; Woods vs. Lee, 21 La. An. 505; Southern Bank vs. Humphires, 47 Ill., 227; Parker vs. Kane, 22 How., 14.)

IV. It was competent for the sheriff to execute the unreturned executions under which levies had been made by his predecessor in office, without making any further levy; and no *venditioni exponas* was necessary to enable him to do so. (Wood vs. Messerly, 46 Mo., 255; Boyd vs. Jones, 49 Mo., 202; Stewart vs. Severance, 43 Mo., 322; McDonald vs. Gronefeld, 45 Mo., 28; Duncan vs. Matney, 29 Mo., 368; Porter vs. Mariner, 50 Mo., 364.)

V. It is admitted that a sale under an execution, after the same is satisfied, is void. (Durette vs. Briggs, 47 Mo., 356.) But the return of the sheriff is no evidence that the land was sold in the order in which the sales are recited, either in the deeds or the return. (Jackson vs. Robert, 11 Wend., 422.) And it was the duty of the sheriff to apply the first bid upon the oldest execution. (Russell vs. Gibbs, 5 Con., 390; Rowe vs. Richardson, 5 Barb., 385; Camp vs. Chamberlain, 5 Den., 198; Barker vs. Gates, 1 How. Pr., 77.) A sale on several executions is not evaded by a defect in the judgments on which a part of them were issued. (Brace vs. Westervelt, E. D. Smith, 440; Herrick vs. Graves, 16 Wis., 157.) By the sheriff's sale and the execution and acknowledgment of a deed to Calhoun, and the delivery thereof to the recorder for record, the legal title passed to Calhoun; and the court in decreeing this title in Kane necessarily adjudicated upon the question of the delivery of the deed, and this adjudica-

tion is binding upon the defendants. (Bigelow on Estoppel, 75 and 286; Gorham vs. Brennon, 2 Den., 147; Logan vs. Moore, 1 Dana, 57; Adams vs. Barnes, 17 Mass., 365; Cooper's Lessee vs. Galbraith, 3 Wash. C. C., 550; Massey vs. Thompson, 2 N. & McCord, 105; McKnight vs. Gordon, 13 Rich. Eq., 222.)

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment. The defendants are the widow and heirs of James McCown. The suit was originally against McCown, but, on his death, proceeded against his widow and children. It was revived against the widow, as administratrix, and against the minor children, who filed answers by their guardian *ad litem*.

The defendant, Caroline McCown, set up her dower rights, and her right to remain in the mansion house of her husband until dower was assigned. There was a replication to the answer, denying that McCown died seized of the premises, and also averring, that his mansion house and the messuage and plantation adjoining embraced only a portion of the land sued for.

The title of the plaintiff is based upon two deeds made by the sheriff under sales made under six special judgments in attachment and executions thereon. One of the deeds is directly to plaintiff; the other is to one Calhoun, and is accompanied with a decree of the Circuit Court of Johnson county, vesting the title of Calhoun in plaintiff. The deed to the plaintiff recited a judgment in a suit by attachment in favor of H. C. Grove, rendered April 21, 1864, upon which a special execution was ordered and was issued Sept. 4, 1865; and a judgment in a suit by attachment in favor of Sarah Colburn, rendered April 21, 1864, upon which a special execution was ordered and issued Sept. 4, 1865; and a judgment in attachment in favor of one Marr, rendered April 21, 1864, and an execution ordered and issued as in the other cases; and a judgment in favor of Calhoun of the same date and the execution dated as above.

These four executions, it is recited in the deed, were delivered to the sheriff on the 12th of Sept. 1865, and that, after advertising the land levied on, said lands were sold to plaintiff on Oct. 17, 1865, and that the sale took place before the court house door and while the Circuit Court was in session.

Objections were made to this deed on the ground, that the sale took place at the door of a church or meeting house in the town of Warrensburg where the Circuit Court was held, such building being then used as a court house, and the fact that the sale did so take place was proved.

It seems that the court house was occupied by Federal troops, and was otherwise unfitted for holding court, and the court was held in a building distant some hundred yards or more from the court house.

The second deed offered by plaintiff was to Calhoun. It recited a judgment in an attachment suit in favor of one St. John, rendered April 21, 1864, upon which an execution issued Sept. 15, 1864, and made returnable at the Oct. term, and, no Oct. term being held, the execution was delivered to the sheriff on Feb. 9, 1865; and a judgment in an attachment suit in favor of Colburn, rendered April 21, 1864, on which a special execution issued Sept. 16, 1864, made returnable to the Oct. term 1864, and, that this term not being held, this execution was delivered to the sheriff Feb. 9, 1865; and a judgment in a proceeding by attachment in favor of Sarah Colburn rendered April 21, 1864, on which a special execution was issued Sept. 16, 1864, returnable to the Oct. term, 1864, and as no such term was held, the writ was delivered to the sheriff Feb. 9, 1865; and a judgment in attachment in favor of John Marr, rendered April 21, 1864, upon which a special execution issued Feb. 8, 1865, returnable to the April term 1865; and a judgment in favor of William Calhoun, rendered April 21, 1864, upon which a special execution issued Feb. 8, 1865, returnable April term, 1865. This deed further recites the levy, advertisement and sale, and purchase by plaintiff.

The principal objections to this second deed are, that the

executions on the judgments in favor of St. John and Colburn were issued in Sept. 1864 and were returnable to the Oct. term, and not having been executed were handed over to the successor of the sheriff to whom they were directed, and executed by said successor. The first officer had levied on land under the writs. It is claimed that these executions were dead in Feb. 1865. It is further objected to this deed that the deed had never been delivered to Calhoun. To sustain this objection, Calhoun was examined, and stated that he knew nothing of the deed. To obviate this objection, the plaintiff read the record of a proceeding in the Common Pleas Court of Johnson county, in which the present plaintiff, Kane, was plaintiff and William Calhoun defendant, which resulted in a decree to transfer Calhoun's title to the said plaintiff.

The orders of publication in this case were made by the clerk in vacation and are as follows:

"H. C. Grove, plaintiff,
vs.
James McCown, deft.

In the Circuit Court of Johnson County. In vacation Jan. 23, 1864.

Now on this 28th day of July, 1862, comes the said plaintiff in the above entitled cause before the undersigned, clerk of the Circuit Court for the county of Johnson, in the State of Missouri, in vacation, and filed his petition and affidavit, stating among other things, that said defendant, James McCown, had absented himself from his usual place of abode in this State, so that the ordinary process of law could not be served on him, and that said defendant, W. H. Hart, is not a resident of this State.

It is, therefore, ordered by the said clerk in vacation, that publication be made, notifying said defendants that an action has been commenced against them, by petition and attachment, in the Circuit Court of said County of Johnson, founded on a promissory note for the sum of seventy-five dollars, dated on the 10th day of Nov., 1860, and due sixty days after date, and made and delivered by said defendant to said plaintiff,

and that the property of said McCown has been attached, and unless he be and appear at the next term of said court to be held at the court house in the town of Warrensburg on the 10th day of April 1864, and on or before the 3d day of the term, if the term shall so long continue, if not, then before the end of the term, and plead to said petition, judgment will be rendered against him and his property sold to satisfy the same.

It is further ordered that a copy hereof be published in some newspaper printed in this State, for four weeks successively, the last insertion to be at least four weeks before the commencement of the next term of this court.

S. P. Williams, Clerk."

The court, at the instance of plaintiff, declared the law to be as stated in the three following instructions:

1. If the court, sitting as a jury, finds from the evidence, that on the 21st day of April, 1864, certain special judgments were rendered in the Circuit Court of Johnson county, one of which judgments was in favor of H. C. Grove and against James McCown, one in favor of Sarah Colburn and against James McCown, one in favor of John Marr and against James McCown, and one in favor of William Calhoun and against said James McCown; and that the same were duly returned unsatisfied, either in whole or in part, and that afterward *alias* special executions were issued upon the judgments aforesaid on the 4th day of Sept., 1865, and the same were duly delivered to the sheriff of Johnson county; and that in pursuance of the commands of said executions, the sheriff of Johnson county, after giving twenty days' notice of the time and place at which said real estate would be sold, afterwards on the 17th day of Oct., 1865, exposed the same to sale at public auction at the door of the building in which the Circuit Court of said county was then in session, and which building was then used and occupied as a court house in said county, and that at said sale the plaintiff, George Kane, became the purchaser of the land, to wit: (here the land is described,) and that he has received a sheriff's deed to said land

duly executed and as read in evidence, then said sale and the deed so executed was sufficient to vest the legal title to said land in said Kane, and judgment for the possession of the real estate aforesaid should be found for the plaintiff.

2. If the court finds the executions recited in the sheriff's deed to William Calhoun, read in evidence on the part of the plaintiff, were issued as follows, to wit: The one in favor of W. H. and G. W. Colburn, on Sept, 16, 1864; the one in favor of Arthur St. John, Sept. 15, 1864; and the one in favor of Sarah Colburn, in September, 1864; that the same were all made returnable to the Oct. term of said court, 1864, and that the same were delivered to A. M. Christian, then sheriff of said county, and that he on the——day of Sept., 1864, levied the same on the real estate described in said deed, by indorsing his said levy on the back thereof, and that for any cause said lands were not sold at the said Oct. term of said court; and that afterwards, on the 9th day of Feb., 1865, said A. M. Christian delivered said executions to T. W. Williams, his successor in office, then said executions were sufficient authority for him to sell said land, at the time and in the manner stated in said deed, to said Calhoun.

3. If the court finds from the record in the case, that this suit was brought against James McCown in his life-time, and that the said James McCown appeared and filed his answer herein; and that he, the said James McCown, afterwards departed this life, leaving Caroline F. McCown his widow, and and the other defendants herein his heirs at law, and that this suit was afterwards revived against the said Caroline F. McCown, as the administratrix of the said James McCown, and against the said other defendants as his heirs at law, then plaintiff is entitled to the like judgment for the possession of the premises as he would have been if the original defendant, James McCown, had not departed this life during the pendency of this action.

Defendants asked the court to make the following declarations of law, of which the 2nd and 5th were given:

1. If the court finds from the evidence, that the petitions

and affidavits, upon which the said several judgments, recited in the said sheriff's deeds, were rendered, were filed in the office of the clerk of the Circuit Court of said county in vacation, to-wit: In the case of W. H. and G. W. Colburn, June 14, 1862; in the case of St. John, June 20, 1862; in the case of Grove, June 28, 1862; in the case of Sarah Colburn, June 27, 1862; in the case of Calhoun, July 14, 1862; in the case of John Marr, July 14, 1862; and further find, that a term of said court was held in October, 1862, at which time said papers were returned into said court; and that the only notices or orders of publication, ever made or given in said cases to defendant McCown, were made and issued by the clerk of said court in vacation, to wit: In the case of Colburn, on January 22, 1864; in the case of St. John, on the same day; in case of said Grove, January 23, 1864; in case of Sarah Colburn, January 26, 1864; in case of said Calhoun, Jan. 23, 1864; and in case of Marr, Jan. 29, 1864, after said term of said court, in October 1862, then the clerk of said court had no authority to issue such orders of publication, and defendant was not legally notified of the pendency of said actions, or either of them; and the said several judgments afterwards rendered in said cases against said McCown, upon the proof of the publication of such notices, were and are null and void, and all subsequent proceedings are and were null and void; and the court should find the issues for the defendants.

2. If the court finds, that said executions, recited in the said sheriff's deed to Calhoun read in evidence, to-wit: That in favor of the Colburns was issued on the 16th of September, 1864; that in favor of St. John, September 15, 1864; that in favor of Sarah Colburn, Sept. 16, 1864; and were all made returnable to the October term, 1864; that the same came into the hands of Sheriff T. W. Williams on the 9th day of February, 1865, unexecuted by A. M. Christian, the former sheriff of said county, then said executions, and each of them, conferred no authority on Sheriff Williams to sell said land; and if the court so finds, then the executions in favor of said Colburn and Marr were the only ones that conferred any

authority on the sheriff to sell the said land. And if the court finds, that said sheriff sold said lands in the order of time in his said amended return specified, and that the sale of said southeast quarter of section 20, township 46, range 26, sold to said Union Bank for the sum of $680, the same was sufficient to satisfy and pay off said executions in favor of said Calhoun and Marr; and said sum so bid by the Union Bank, and paid to said sheriff, was sufficient to pay said executions in favor of said Calhoun and Marr, as well as the judgments upon which they were issued; and all sales, made by said sheriff after said executions were so satisfied, were and are null and void; and the sheriff's deed to Calhoun, for lands so sold after said executions were so satisfied, conferred no title on said Calhoun.

3. If the court finds from the evidence, that the lands in controversy were sold by the sheriff of said county under executions, and that the said sales were made by the sheriff at the door of the church, some eighty yards or more distant from the court house, and that plaintiff claims title under such sales, then such sales were null and void, and the deeds made in pursuance thereof conveyed no title whatever.

4. If the court finds from the evidence and pleadings in this cause, that said James McCown died possessed of the lands in controversy, and that the different tracts thereof were all contiguous to each other, and constituted the farm or plantation on which was situated the mansion house in which the said McCown resided some time before and at the time of his death, and in which Caroline F. McCown, one of the defendants, resided with him at the time of his death, as his wife, and where she since, and now, resides as his widow, and that her dower therein has never been assigned to her as the widow of said McCown, then the defendant, Caroline, is entitled to the possession of the lands in controversy as against the claim of the said plaintiff, Kane; and the court must find the issues for the defendant.

5. The court in this case declares the law to be, that according to the present condition of the pleadings it stands admit-

ted herein, that the defendant, Caroline F. McCown, is the widow of said James McCown, and that he departed this life about the 6th day of July, 1867; that at the time of his death the said McCown, and his family, including the defendant, Caroline F. McCown, were, and for a long time had been, residing in the mansion house situate on the land in controversy; that the said defendant, Caroline, at the time of her said husband's death, resided with him at said mansion house; that the said Caroline, at the time of the death of the said said James McCown, became, ever since has been, and now is, entitled to dower in the lands in controversy, and that dower never has been assigned or admeasured to her therein, or in any part thereof.

6. The court declares the law to be, that if it finds from the evidence that the sheriff's deed, executed by Thos. W. Williams, sheriff of Johnson county, to the plaintiff, George Kane, purporting to convey part of the land in controversy, was by the said sheriff acknowledged in open court on the 20th day of April, 1866, and was thereafter delivered by said sheriff to said Kane, and was by him received on the 3rd day of October, 1866, and was by him duly filed for record in the office of the recorder for Johnson county, and therein recorded; that afterwards said Thos. W. Williams, on the 17th day of October, 1871, at the instance and special request of said plaintiff, Kane, interpolated said deed by inserting over the ninth line of the third page of said deed, over and between the word "court" and the words "for the year 1864," so as to interpolate the year in which a judgment therein recited was rendered, which judgment was one under which said plaintiff claims title, and that said Thos. W. Williams, on the 17th day of October, 1871, at the instance and request of said plaintiff, Kane, interpolated said deed, by writing over the 21st line of the 6th page of said deed, over and between the word "court" and the words "for the year 1864," so as to interpolate the year in which a judgment recited in said deed was rendered in favor of William Calhoun, and under which judgment the plaintiff claims title; and that after said deed was so interpo-

lated, the same was not thereafter acknowledged, then said interpolations were illegally made, and are a nullity, and the said deed is a nullity, and cannot convey any title to the lands in controversy, or any part thereof, to the said plaintiff.

7. The court declares the law to be, that if it finds from the evidence, that the sheriff's deed, purporting to have been made by Thos. W. Williams to William Calhoun, and under which the plaintiff claims title to a part of the land in controversy, was never ordered to be drawn or executed by the said Calhoun; that it was never delivered to said Calhoun; that it was never placed on record by the said Calhoun; then the said deed cannot convey any title whatever to the lands in controversy, or any part thereof, to the said plaintiff, Kane.

The discussion in this case has embraced a variety of points, but they mainly depend on the following inquiries: First, whether the clerk had any power to order the publication which he did in January, 1864; Second, whether the failure to designate the newspaper in the order rendered it void; Third, whether the executions recited in the deed to Calhoun had expired before the sale, and if not, whether Williams, the successor of the sheriff to whom they were directed, had any power to make the sale; Fourth; if the sale at the door of the church, where the Circuit Court was being held at the time, was valid; Fifth, whether the decree, in the case of Kane vs. Calhoun, transferred Calhoun's title to plaintiff.

There were other points made and discussed, but they are minor and subordinate ones.

It will be seen that the order of publication in this case was made in January, 1864, upon a petition and affidavit, filed in 1862, and it is insisted, that, under the 23rd section of the attachment law of 1855, the power of the clerk to make an order in vacation ceased at the first session of the court after the issuance of the writ. This 23rd section provides, that, if the plaintiff, or some one for him, files with his petition an additional affidavit, stating that all or a part of the defendants are non-residents or have abandoned, etc., the clerk, in vacation, shall order a publication. It further provides, that when

the defendant is not summoned, and the return of the sheriff shows that he cannot be, the court must order a publication. This section is very obscure and couched in terms scarcely intelligible; but the above is substantially its meaning, and it is insisted, that, after the term of the court which succeeds the filing of the petition, the authority of the clerk ceases.

It might be a question whether it did or not under this 23rd section of the act of 1855, but in 1860 the Legislature provided as follows: "If an attachment be obtained on either of the grounds specified in the first, third or fourth sub-divisions of section one of the act to provide for suits by attachment, approved December 8, 1855, or if, after an attachment issued, an additional affidavit be filed alleging any fact embraced in these sub-divisions, the clerk shall order a publication to be made as required in section 23 of article 1 of said act, and he may, in like manner, order publication in any case, in which, by said section, it is required to be ordered by the court."

Now this provision presents the anomaly of requiring a clerk to discharge the duties neglected by the court, and the clerk is to determine whether the court ought to have issued an order of publication or not. But the legislature clearly invests the clerk with the power to make orders of publication in all cases where the court should, in term, have made them, and this power is not limited to the vacation which precedes the first session after the filing of the petition. Whether the clerk in this case decided rightly or otherwise, is of no importance, since he was invested with the power to decide, and did issue the order of publication.

A further objection to this order of publication is, that the order does not designate the newspaper in which it was to be printed. The practice act of 1855 (Rev. Code of 1855, p. 1225), directed that "every order against non-resident, absent or unknown defendants shall be published in some newspaper published in this State, which the court, judge or clerk, making the order, may designate as most likely to give notice to the person to be notified."

It is very clear that a designation by the court, clerk, or judge is required. But it is not clear that the designation must appear in the order of publication. If the court, or judge, or clerk should select a newspaper manifestly designed to avoid giving notice to the party interested, or clearly proved to have been made with such a design, the order of publication would have no efficacy. In this case there was no proof as to the paper selected by the clerk, and although the order is objected to as not in itself specifying the newspaper, it is not attempted to be shown, that the newspaper actually selected was not published within the State, or that it was not likely and most likely to give notice to the parties interested. In a collateral proceeding to nullify the judgment, and execution on it, presumptions are all in favor of the validity of the judgments and sales. The omission of the clerk to designate the particular newspaper was undoubtedly an error, which may or may not have been fatal to the case in direct proceedings to review it, but cannot destroy the judgment in a collateral proceeding.

It is contended, that the execution, under which these sales were made, had expired before they were executed. All the judgments were rendered in April, 1864, and the executions on them were returnable to the October term, 1864. No October term was held, the executions were levied, and as no sales could have been made in October, 1864, new executions, or writs *venditioni exponas* were issued in February, 1865, returnable to the April term, 1865, or the writs were handed over to the sheriff elected and acting in 1865, to be completed after levy.

These objections have already been considered and decided in the cases of Stewart vs. Severance, 43 Mo., 322, and Buchanan vs. Tracy, 45 Mo., 437. The act of March 23, 1863, is considered as authorizing such sales after the return day of the writs.

The proper construction of the various sections of our execution law, which are substantially the same in the Revised Code of 1855, and that of 1865, from section 59 to section

63 is not entirely clear; but upon the whole we think the intention of the law was to require executions not completely executed to be handed over to and completed by the sheriff in office at the time of the sales. The 59th section does not prohibit this in the case of levies by a previous sheriff, although the 60th section undoubtedly authorizes the sheriff, who levies the writ, to go on and complete the various acts required under the original process. He is not required to do so, and the practice has been otherwise. This section is merely designed to give validity to, or rather to recognize the validity of, a title acquired in this way. The power of the officer, who makes the levy, to proceed with the advertisement, sale and deed is recognized. But the 59th section does not say that, if the original officer, who levies the writ, hands it over to his successor, who proceeds to make advertisement and sale, and deed, such sale and deed are void.

Admitting that this section does not require the sheriff who makes the levy to hand over the writ to his successor, simply because his term of office has expired, and that the words "not executed" have no application to a case where there has been a levy, still it does not prohibit the officer from so handing over to his successor writs which have been only partially executed; and in either event the sale is valid and the deed valid. The successor may adopt the levy of his predecessor and proceed with the advertisement, sale and deed; and so if the original sheriff who makes the levy, instead of handing over to his successor the writ, chooses to proceed under the 62nd section and make advertisement, sale and execute a deed, it is also valid. And this seems to be the opinion of this court in Duncan vs. Matney, 29 Mo., 368; and Mechanics' Bank vs. Harrison, 39 Mo., 433.

The clerical error, made in the deeds in which the judgment in favor of Colburn was recited, as rendered April 21st, 1865, was corrected.

It was manifestly a mere clerical error, since the sales were made before the date of this recited judgment, and all the other judgments were recited as occurring on April 21st, 1864.

This correction was made by allowing the sheriff to amend his return, and by then correcting the error in dates in open court. It is insisted, however, that the corrected deed was never acknowledged, but as the correction was made in open court, there would seem to be no necessity for a formal acknowledgment of the deed thus corrected. It had already been once acknowledged and the record of the acknowledgment made.

But it is urged, that all these sales, having been made at the door of a church or meeting house, in which the Circuit Court at the time held its sessions, in the town of Warrensburg, were therefore void. The evidence clearly established the fact that the sales were at the door of a building not usually used as a court house, but which at the time was so used, because the building regularly appropriated to these purposes was occupied by troops of soldiers, and was otherwise not in a condition to be used as a court house. It is plain that a sale at the door of the deserted court house, where no court was in session, would have been utterly against the spirit and meaning of the law. Whether the County Court had failed to provide a suitable building for holding court, or whether the Circuit Court had selected the building for its session, is not material. It could not be maintained, that the proceedings of the Circuit Court would be invalid, although its sittings were not in a building designated by the County Court. Both buildings were at the county seat of the county. And the obvious meaning of the execution law is to require sales at the door of the building occupied and used as a court house.

Another objection to the plaintiff's title is that the sheriff's deed to Calhoun was not delivered. Calhoun had transferred his rights under his purchase to the plaintiff, and, in a proceeding on the part of the plaintiff against Calhoun, the court had decreed a transfer of Calhoun's title to plaintiff. The deed to Calhoun was executed, acknowledged and recorded, and this was equivalent to a delivery. No formal delivery was necessary, as the law presumes a delivery under such circumstances.

The decree transferred Calhoun's title to plaintiff, although this decree was rendered between parties other than those in the present suit, and was not therefore binding against persons not parties of it. The decree is simply offered to establish the title of plaintiff to whatever title Calhoun had. It was a fact in his chain of title, and it was competent evidence against all the world on this point, as much as a deed from Calhoun to the plaintiff would have been. The decree simply transferred the legal title to the owner of the equitable title, and it was only used to show this.

The point, that an order of publication, and publication, were essential to the jurisdiction of the court in attachment cases, has been extensively discussed in this case. As the record recites that there was an order of publication and an actual publication according to law, it is obvious that no such question is presented by this case. In my opinion the question is a mere abstraction.

The question was presented and discussed in the case of Freeman vs. Thompson (53 Mo., 183), and the opinion of the court, or a majority of the court, was expressed on it. The question was, in that case, presented by the instructions, and though its decision might have been avoided, the opinion was not therefore an *obiter dictum*.

It frequently happens, that the decision of a single point in a case will determine the affirmance or reversal of the judgment in that case, but it does not follow that the court may not proceed to examine and decide other points which the record presents; and indeed the latter course is most satisfactory to all parties concerned, and saves the necessity of again resorting to the Appellate Court.

That opinion had the unqualified approbation of three of the judges, and any view, which I might entertain, would be superfluous. Besides it is difficult to see how this question has any practical importance. The statute requires an order of publication, and a publication, and prohibits the Circuit Court from entering a judgment until these pre-requisites have been performed. It can hardly happen—I doubt if it has ever

happened—that the courts have ever attempted to enter judgment, unless in their opinion and finding an order of publication had been made and a publication made in pursuance of such order; and further that the order and its compliance substantially conformed to the requisites of the statute.

The order of publication may be defective, and the mode of the publication made may not conform to the provisions of the statute, but whether the order or the publication is so defective that the court should not proceed to judgment, is a point decided by the court which tries the case, and its decision one way or the other is merely a matter for review in a direct proceeding to set aside the judgment.

There can be no doubt, that the court has jurisdiction to decide such questions, when jurisdiction has already been acquired by service of the writ of attachment, which of course must be a valid writ conforming essentially and substantially to the requirements of the act, and issued by the clerk in conformity with the power vested in him. There is then a case in court, and if every point arising subsequently is erroneously decided, still the purchaser under a judgment is not affected by such error. This general principle is essential to the security of hundreds of titles, and though doubtless in many instances, probably in this, the property of the defendant is ruinously sacrificed by the sale under the execution, it must also be borne in mind that frequently the *bona fide* purchaser, at a fair price, may equally be subjected to the risks of future accessions of value to the property sold, which form so common a temptation for heirs to wish to set aside sales, years after they are made, upon merely technical grounds.

It is said, however, that where there is no publication, such as is required by law, the court has no jurisdiction over the person of the non-resident, and can therefore pass no judgment on him, even so far as the property attached is concerned.

The judgment in such cases, it will be observed, can only

affect the property attached, and when the record shows a finding of the court, that there has been a legal order of publication, and a publication made in pursuance of such order, it is not apparent how this finding or determination of fact can be attacked collaterally any more than any other conclusion of the court in the course of its proceeding to final judgment. Its opinion on the sufficiency of the order of publication may be entirely wrong, reversible on review, but the error does not vitiate the title acquired under the judgment. In the language of Mr. Justice Miller, in Cooper vs. Reynolds, (10 Wall., 321), to hold such judgments, sales and deeds void "would be to overturn the uniform course of decision in this court, to unsettle titles to vast amounts of property long held in reliance on those decisions, and to sacrifice sound principles to barren technicalities."

This judgment must be reversed, since it is conceded that Mrs. McCown was entitled to dower in the land, and there was no right of immediate possession, and it is therefore reversed, with instructions to enter the judgment with a stay of execution until the widow's dower is assigned.

The other judges concur.

L. R. PERKINS, Respondent, *vs.* Mo., K. & T. R. R., Appellant.

1. *Railroads—Damage for ejecting passenger—Tender of fare—Effort to procure ticket.*—In an action for damages against a railroad company for ejecting plaintiff from defendant's cars, evidence that a friend of plaintiff offered to pay the amount claimed by the conductor, while the latter was attempting to put plaintiff off the train for refusal to pay his fare, was not proper evidence to show that plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance.

In such suit evidence that plaintiff had made an ineffectual attempt to procure a ticket before entering the train, although incompetent to show his right to remain on the cars without payment of fare, would be proper, nevertheless, in order to show his good faith in getting aboard without his ticket, and as a part of the *res gestæ*.

2. *Railroads—Putting passenger out of train—Malice of conductor—Liability of company.*—Where it becomes the duty of a railroad conductor to put off a passenger for refusal to pay his fare, (Wagn. Stat., p. 307, § 28,) the company will be liable for any injury which may result to the passenger from the negligent or improper manner in which the conductor performs this act; and the company is bound when in such case the injuries are inflicted willfully or maliciously. When the agents of a corporation act in the scope of their authority in a willful or malicious manner, the company is responsible for resulting damages.

3. *Practice—Supreme Court—Jury—Evidence, etc.*—This court will not disturb the verdict of the jury on a question of conflicting evidence in an action for damages.

4. *Railroad Companies—When liable for malicious acts of their officers.*—*Semble* that where a conductor wrongfully and maliciously ejects a passenger from his train, the jury may, in addition to compensation for injuries received, assess exemplary or punitive damages, and *held*, that a slight circumstance, such as the retention of the officer in its employ by the company afterward, will be construed into a ratification of his act, and the company will be so liable.

Appeal from Henry Circuit Court.

J. Montgomery, for Appellant.

I. After plaintiff had refused to pay the regular fare, the defendant was under no obligation to transport him further, but had the right to eject him from the cars; and any subsequent offer to pay the fare did not affect this right. (O'Brien vs. Boston & Worcester R. R. Co., 15 Gray, 20.)

II. The court below erred in permitting the witness, Carr, to state, against defendant's objections, what passed between witness and the station agent, Berry, about there being no time to get tickets. There was no such issue in the pleadings, and the admission of this testimony had the direct effect of prejudicing the jury against defendant, by showing that defendant's agent was derelict in his duty, and that plaintiff had tried to buy a ticket at the station, and was unable to do so by reason of the agent's negligence.

III. The evidence shows that the injury to plaintiff was by a kick received by him in the face, after he was put off from the cars, and for this the defendant is not liable. The company then ceased to be liable for the acts of its employees, if such acts were beyond the line of their duty, or oppressive. The case of Goddard vs. Grand Trunk Railway,

reported in Redfield's Am. Railway Cases, Vol. II, 504, lays down the doctrine, that, if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. Now after Perkins refused to pay his fare and was ejected from the cars, the relation of carrier and passenger no longer existed between defendant and him, and any act of the conductor from that time was his own act, not that of defendant.

IV. The court erred in instructing the jury that they could find punitory damages for plaintiff. (McKeon vs. Citizen's Railway Co., 42 Mo., 79.)

La Due & Vance, for Respondent.

I. If the passenger is assaulted and insulted through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible. (Goddard vs. Grand Trunk Railroad, Am. Law Reg. (Jan. 1871), p. 17; Moore vs. Railroad, 4 Gray, 465; Railroad vs. Finney, 10 Wis., 388; Railroad vs. Vandiver, 42 Penn., 365; Landreaux vs. Bel, 5 La., 434; Railroad vs. Derby, 14 How., 418; Nieto vs. Clark, 1 Cliff., 145; Railroad vs. Blocher, 27 Md., 277; Weed v. R. R., 17 N. Y., 362.)

II. In Kline vs. Central Pacific Railroad, (37 Cal., 400,) it is held, that in a conductor's excluding a person who is not entitled to be admitted or to remain in the cars, the relation of master and servant is as clear and apparent as it is in receiving and providing for those who are entitled to admission. And in the same case it was held, that it was within the general scope of a conductor's authority to remove a person from the cars who was on wrongfully, but that, if in doing so he used unnecessary force or acted wantonly or maliciously, the company would be liable.

III. The damages were not excessive. (Goddard vs. Grand Trunk Railway, *supra;* Day vs. Woodworth, 13 How., 363.)

IV. The testimony in this case shows, that the company, after the act complained of, still retained the conductor in their employ

VORIES, Judge, delivered the opinion of the court.

This suit was brought by the plaintiff to recover damages for injuries charged to have been sustained by plaintiff, by the acts of the agents conducting a train of cars of the defendant, in wrongfully ejecting plaintiff from the cars of defendant when he was a passenger thereon. The petition in substance charges, that the defendant is a corporation organized under the laws of this State, and is the owner of a railroad with locomotives and cars thereon, by which it conveys passengers for hire; that on the 11th day of July, 1871, plaintiff got on the cars of defendant being run and used on the line of said railroad, at the town or station of Calhoun, to be carried and conveyed as a passenger to the town of Windsor, situate on said road; that plaintiff at the time paid defendant for such passage and conveyance the sum of fifty-five cents, which sum was received and accepted by defendant; that defendant thereby then received plaintiff into and upon said cars as a passenger and undertook to transport him as aforesaid; that afterwards on said day, when said cars were in motion and had reached a point about one mile distant from Calhoun along the line of defendant's road, said defendant, unlawfully intending to injure plaintiff and to put him to great trouble and expense, wholly neglected and refused to convey plaintiff to the town of Windsor, but caused said cars to be stopped at a point upon the line of said railroad, distant from any dwelling house or regular stopping place on the line of said road, and forcibly and with violence ejected plaintiff from, and refused to let him re-enter, said cars, although plaintiff offered to pay defendant any reasonable additional sum necessary and right, as a compensation for such passage.

The petition alleges, that plaintiff was greatly abused, beat, bruised, choked, kicked and wounded by defendant, the said defendant wrongfully intending him, the said plaintiff, to be put to great trouble and expense; that said defendant so intending caused said cars to move off and leave plaintiff, unattended and weak from his wounds and exhaustion, to make

his way to some place of assistance; that by reason of said injuries and wrongful acts plaintiff was put to great trouble and expense, and was damaged in the sum of five thousand dollars, for which judgment is prayed.

The defendant answered, and denied that on the 11th day of July, 1871, the plaintiff got on to defendant's cars and paid the sum of fifty-five cents for his passage to the town of Windsor, as charged in the petition; but avers that on the contrary plaintiff refused to pay his fare, etc. It is then averred in the answer, that at the time stated in the petition plaintiff got on the car of defendant at said town of Calhoun, without having purchased a ticket, and without a pass; and after the train was in motion the conductor of the defendant on said car inquired of him where he desired to go. Plaintiff replied, to Windsor. He was then informed of the regular fare to Windsor, which plaintiff refused to pay; whereupon the conductor ejected plaintiff from the car, using no more force than was necessary for said purpose.

The answer then denies, that plaintiff was in any manner unjustly treated or injured by defendant or its employees in the discharge of their duties, or that he was put to any expense or trouble by any unlawful act of defendant; but charges, that plaintiff was so put off of the cars because of his refusal to pay the full and regular fare from and to the points named; denies that plaintiff was kicked, beat, bruised, choked or wounded, in the act of so putting him off from the cars as aforesaid, or that he was damaged thereby.

The plaintiff replied to this answer, admitting that he got on the car without first paying his fare; but denies all other affirmative allegations in the answer. A trial was had before a jury at the December term of said court for the year 1871. The jury after hearing the evidence, and the instructions of the court, found a verdict in favor of the plaintiff, and assessed his damages at the sum of $3500. The defendant in due time filed a motion for a new trial, which being overruled, it excepted and appealed to this court.

The evidence on the part of the plaintiff tended to prove, that

the plaintiff and one Carr, on the 11th day of July, 1871, in the afternoon or evening of said day, went to the town or station of Calhoun on defendant's railroad, in order to take passage from thence to Windsor, another station on said road about eight miles distant; that they got to Calhoun sometime before the train passing in the direction of Windsor arrived; that they had made an attempt to purchase tickets to Windsor, but the ticket agent was busy and they could get none; that the price charged for fare from Calhoun to Windsor was sixty cents when paid on the train, or at least that was what Carr was charged; that the plaintiff had eighty cents in money, but while on the platform just as he got on the cars he lost part of his money, so that after he entered the car he only had thirty cents; that plaintiff and Carr, when the train arrived, went into the car and took seats near together; that the conductor soon came along to collect the fare from passengers; that plaintiff after searching his pockets told the conductor that he had dropped part of his money on the platform, or near the platform, just as he got on the train, and that he only had thirty cents left; that the conductor then pulled the bell rope, telling plaintiff that game had played out; that the conductor seemed at once to get excited. Plaintiff told him not to get excited, that his companion, Carr, had money, and he would get money from him to pay his fare; that Carr then gave the conductor twenty-five cents in addition to the thirty cents given him by plaintiff; that the fare from Calhoun to Windsor was fifty cents or was so contended by plaintiff. The conductor then caught plaintiff by the throat, called others to his aid, pulled plaintiff to the door of the car; that plaintiff resisted, held to the seats and to the door to prevent his being thrown from the cars; that the plaintiff at the door expostulated with the conductor, telling him that, if they would act with a little reason, when the cars were stopped he would get off; that during the scuffle both inside and outside of the door of the car, the conductor struck and kicked plantiff; that the cars were still in motion, and that Carr had offered the conductor, while they were engaged in putting plain-

tiff off, to pay whatever might be necessary to pay full fare for plaintiff, and that Carr had requested them not to injure or hurt plaintiff, as he had a large family to support; that Carr had also cautioned plaintiff not to let go and fall off the car, as if he did he would be injured; that, while plaintiff was holding on to the railing on the platform of the car, the conductor kicked him violently in the face.

The plaintiff testified that the kicks in his face fractured his jaw-bone, and broke out of some of his teeth. The plaintiff, while testifying, was asked to state the effect the treatment received from the men on the train had upon his health up to the time of the trial? This question was objected to by the defendant, because the plaintiff was not competent, and, the objection being overruled, he at the time excepted.

The evidence further tends to show, that plaintiff was injured in his throat, and that his jaw was fractured; that it inflamed, and had to be lanced; and that portions of the bones were scaled off and came out, and that it is still unsound and will likely kill him unless an operation is performed and other parts of the bone removed. The evidence on the part of the plaintiff also tended to prove, that he was put off from the cars late in the evening, when there was no station or house on the road, and that the same conductor is still retained on the train of defendant.

The defendant introduced evidence which tended to prove that plaintiff had paid forty-five cents for his fare, and refused to pay any more, the fare being sixty cents; that after he refused to pay any more, the amount paid was offered back to him, which he refused to receive; that the money was placed on the seat by him, the cars were stopped, and plaintiff was put off by the conductor and others, who came to his assistance; that plaintiff resisted, and that it took some force to get him off, but he was not struck or bruised until he was off of the cars; that after plaintiff was put off from the cars, he held to the railing on the platform and grabbed at the conductor's face, caught and tore the conductor's hat, when the conductor kicked at him; that when plaintiff let go of the railing he fell

on the ground; and as he got up, he commenced gathering earth and gravel and threw it at the conductor and against the cars; that the conductor then went off from the cars, when he and plaintiff had a scuffle, when plaintiff was thrown down and choked; he then promised to quit throwing at the conductor and cars, when the conductor returned to the cars, and started on his way; that there were two houses in sight of where plaintiff was left, about from two to three hundred yards distant. It is not shown whether the houses were near the road or not. It was not dark when plaintiff was ejected from the cars. The defendant's evidence in other respects contradicted the evidence of plaintiff. At the close of the evidence, the court at the request of the plaintiff instructed the jury as follows:

1st. "If the jury believe from the evidence, that the plaintiff paid, or offered to pay, the conductor in charge of the train, when requested, the usual fare from Calhoun to the place of destination, to-wit: Windsor; and the conductor received the same, or refused to receive the same, and forcibly put plaintiff out of the car without lawful provocation, then the jury will find for the plaintiff, and assess the damages at such sum as they from the evidence believe will compensate plaintiff fr the injuries sustained."

2nd. "The jury are further instructed, that if they believe from the evidence, that the defendant by its conductor, agents or servants, unlawfully, wrongfully and maliciously put the plaintiff out of the cars and off the train of said defendant, as averred in the petition of said plaintiff in this cause, then in addition to assessing damages by way of compensation for injuries received by said plaintiff, they may assess such further amount by way of exemplary damages against defendants, as the jury in their judgment may see proper, not exceeding the sum of five thousand dollars, as claimed in plaintiff's petition."

3rd. "The jury are further instructed, that if they believe from the testimony that the plaintiff did not pay, or offer to pay, the conductor in charge of the train his fare from Calhoun to Windsor, or place of testination, and refused to pay the same

on being requested so to do, then the conductor was justified in putting plaintiff off the train, and using only the necessary force so to do, at some regular station or near some dwelling house as the conductor should elect. Yet if the jury further believe from the testimony, that the conductor and others, agents and servants of the defendant, acting under orders from the conductor, forcibly put plaintiff off from the train, and in so doing used unnecessary force, and unnecessarily beat, kicked and bruised plaintiff, while he was on the train, then the jury will find for the plaintiff, and assess his damages at such sum as they from the evidence believe a just compensation for injuries sustained, and they may also assess such further sum as exemplary or punitive damages, as will be a warning to the defendant and his agents, and which they believe proper under the evidence, not exceeding the sum of five thousand dollars sued for in the petition."

4th. "If the jury believe from the evidence, that the plaintiff paid, or offered to pay, to the conductor of the train the customary and usual fare from Calhoun to Windsor, the place he designed to stop at, and the conductor refused to receive the same, and refused to give plaintiff reasonable time to get the money out of his pocket, or from his friend there on said train, with intent to pay said regular and usual fare; and if the jury further believe from the evidence, that said conductor, agents or servants of said defendant, maliciously and violently put said plaintiff out of the car and off said train, then the defendant is liable and the jury should find for the plaintiff."

The defendant objected to said instructions, and his said objection to each of said instructions being overruled, he duly excepted. The court then, at the request of the defendant, instructed the jury as follows:

1st. "The court charges the law to be, that if any passenger on the train of any railroad in this state shall refuse to pay his fare, or shall behave in an offensive manner, or shall repeatedly violate the rules of the company owning such railroad, it shall be lawful for the conductor of the train, and the servants of

the corporation, to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect on stopping the train."

2nd. "If the jury find from the evidence, that the plaintiff refused to pay the established fare when first requested so to do by the conductor, he from that time forfeited his right to longer remain in the cars, and any subsequent offer on his part to pay his fare would not in law compel the company to transport him further."

3rd. "If the jury find from the evidence, that a trespass or an assault was committed on the person of the plaintiff by the employees of the defendant after said plaintiff had been ejected from defendant's cars, the said employees and not the company are responsible for the loss and damages resulting therefrom.

There were other instructions given on the part of the defendant, which it is not necessary, to a full understanding of the points arising in the case, to recite. The court refused the following instructions asked for on the part of the defendant, to which the defendant saved exceptions, to-wit:

1st. "If the jury find from the evidence, that the employees of the defendant, in ejecting the plaintiff from the cars for the non-payment of his fare, wantonly used unnecessary force, they, and not the company, are responsible for the consequences."

2nd. "The court instructs the jury, that if they believe from the evidence that the plaintiff was hurt by the effect of a kick given him by one Hamilton, who was a conductor on the cars of defendant, and that said Hamilton gave him said kick willfully, and of his own free will and accord, then the defendant is not responsible for any injury that may be the result of said willful act, and they will so find."

The defendant in its motion for a new trial set forth as causes therefor all the usual causes set forth, as well as the rulings of the court herein before excepted to.

The points presented for the consideration of this court are the following:

First.—It is objected by the defendant, that the court improperly permitted evidence on the part of the plaintiff, tending to prove that after plaintiff had refused to pay his regular fare, and the conductor had commenced to eject him from the car, the witness, Carr, had offered to pay his fare for him; and that the court also erred in permitting evidence that plaintiff had attempted to purchase a ticket before he entered the car.

Second.—That the defendant is not liable for the acts of its agents, where the acts were not done in the line of their duties, or when the acts done are malicious or oppressive.

Third.—That the court erred in instructing the jury that they were authorized to find exemplary or punitive damages.

The evidence tending to prove that Carr had offered to pay the balance claimed by the conductor, while the conductor was putting or attempting to put plaintiff off from the train, was not proper evidence to show that plaintiff was from that time entitled to remain on the car, notwithstanding his refusal to pay the fare demanded in the first place, and the court so instructed the jury. And it is not pretended, that the evidence tending to prove that the plaintiff had made an effort to procure a ticket before entering the car would entitle him to remain on the cars without the payment of his fare. The instructions of the court also contradict that supposition; but the evidence was proper to show the good faith of the plaintiff in entering the car, and as being a part of the transaction being investigated and to characterize the conduct of all of the parties engaged, and it was evidently for this purpose only that the evidence was admitted, which is plainly indicated by the instructions given by the court. The jury could not have been misled by the evidence.

It is contended by the defendant, that the plaintiff after entering the car refused to pay his fare, and thereby became a wrong-doer, and was not after that entitled to be considered as a passenger, and was therefore a stranger to defendant, so far as its duties were concerned, and that if the servants of the plaintiff in putting him off of the cars under such circumstan-

ces did willfully and maliciously strike or injure him, defendant is not liable for such willful acts. That the conductor of the train had a right to put plaintiff off from the train in a proper manner, if he refused to pay his fare, there can be no doubt, if it was done in a prudent manner. The authority is given by statute. Our statute concerning Railroad Corporations provides as follows: "If any passenger shall refuse to pay his fare, or shall behave in an offensive manner, or by repeated violations of the rules of the company, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect, on stopping the train." (1 Wagn. Stat., 307, § 28.)

This statute gives the authority to eject a passenger from the cars who refuses to pay his fare, and directs the manner in which it shall be done, and places the matter within the line of the duties of the conductors of the train, and there can be no doubt in reference to the liability of the company for any injury which might result to a passenger from the negligent or imimproper manner in which the conductor should perform the duty. But it is insisted, that for willful or malicious injuries inflicted by the conductor in the performance of this duty or right the company is not liable. I do not think that this position is tenable. Corporations only act by agencies, and whatever their agents do within the scope of their authority is reallythe act of the corporation; and if the agents, in acting within the scope of their authority, act in a willful or malignant manner and damage ensue, they are certainly responsible, and particularly in cases where they are acting with reference to those to whom the corporation are under obligations by law to treat in a different manner. Hence it has been frequently held, that a conductor on a train on a railroad is acting within the scope of his authority when putting persons of the cars who fail to pay their fare, and if while doing so he act in a willful and malicious manner and injury thereby occur, the railroad company is liable therefor. (Kline vs. Central

Pacific R. R., 37 Cal. 400; Moore vs. Fitchbury R. R. Co., 4 Gray, 465; Penn. R. R. Co. vs. Vandiver, 42 Penn. St. 365; Weed vs. Panama, R. R. Co. 17 New York, 362; Philadelphia & Reading R. R. Co. vs. Derby, 14 How. U. S., 468; Goddard vs. Grand Trunk R. R. Co., Am. Law Reg. [Jan. 1871,] p. 17.)

It is further contended by the defendant, that from the evidence in this case the injuries of which the plaintiff complains, if committed by the conductor of the train of defendant, were committed in a difficulty and rencounter between the conductor and plaintiff after he was ejected from the car, which was brought about by the fault of plaintiff and wholly unconnected with the act of the agents of defendant in ejecting plaintiff from the car; and that therefore the defendant is not responsible therefor. It is a sufficient answer to this to state, that upon this subject the evidence is conflicting, and the question, as to when the injuries were inflicted whether on the cars or after the plaintiff was off the cars, was properly submitted to the jury, and we cannot interfere with their finding on that subject.

The only remaining question presented for our consideration is as to the propriety of the instruction given by the court, by which the jury are told, that, if the conductor and agents of defendant, wrongfully and maliciously put the plaintiff out of the car, in such case they might, in addition to compensation for the injuries received, assess such further amount by way of exemplary damages, as they in their judgment might deem proper, not exceeding the amount sued for. This presents a question of more difficult solution. The law is now settled in this State at least, and in most of the courts of the different States, that in actions of tort, when the damages complained of have been wilfully, maliciously or wantonly committed, the plaintiff may recover exemplary or purnitive damages.

In the case of McKeon vs. Citizens Railway Co., (42 Mo. 79,) it was doubted whether exemplary damages could be recovered in any case; but from this view of the law Judge Wagner dissented. In a later case decided in this court, (Buckley vs.

Knapp, 48 Mo. 152,) the right to recover exemplary damages in actions for willful and malicious wrongs was fully discussed and the authorities fully reviewed, and the right to recover exemplary damages fully sustained and upheld. (See also Sedg. Meas. Dam., 520.) This rule is however subject to some qualifications. One of these qualifications is, that a principal cannot in general be compelled to pay exemplary damages for the fault of his agent, if it be neither ratified or authorized by the principal; but slight acts of ratification will generally be sufficient. In the case of Goddard vs. The Grand Trunk Railway Co., before referred to, where the brakeman on the cars assaulted and grossly insulted a passenger, it was held that the mere retention of the brakeman by the company, after it was informed of the conduct of the brakeman, was a sufficient ratification of the act, and that punitive damages were recoverable. In the State of Mississippi it seems to be held, that railroad companies are liable for exemplary damages for the wanton and malicious acts of their agents, and in the State of Kentucky the same rule is adopted. (Bawser vs. Lane, 3 Metc., 311.)

The only way, in which corporations can act in the commission of wrong or otherwise, is by and through their agents. The acts of their agents within the scope of their authority are their acts, and it would seem that there could be no good reason why they should not be responsible for the acts of their agents in the discharge of their duties, when performed in a wanton and malicious manner, just as if the act had been done by the corporation itself. In fact, the act of the agent is the act of the corporation, and in this case the evidence shows, that the conductor, who committed the wanton acts out of which the damages accrued, was at the time of the trial retained by and is still in the employ of the defendant. It will be seen, that the issues of fact in this case were most liberally on the part of the defendant submitted to the jury by the instructions given by the court, and that the instructions refused, with the foregoing view of the case, were properly refused.

The judgment will be affirmed. The other judges concur.

Senate, Opinion of the Judges of the Supreme Court in Response to a Resolution of.

1. The last clause of Art. VI. § 14 of the State Constitution, which provides, that "No judicial circuit shall be altered or changed at any session of the General Assembly next preceding the general election for said judges," does not prohibit the passage, at such session, of a law abolishing the old judicial circuits throughout the State; and creating a new system *in toto*; where the law does not take effect and the new judges are not elected, till the expiration of term of office of the judges holding under the former system

To the Hon. the President of the Senate:

Sir: I have been requested by my associates to reply to a resolution, adopted by the Senate, "requiring the judges of the Supreme Court to give their opinion on the question, whether the General Assembly of this State has the constitutional power, at its present session, to change the boundaries of the judicial circuits of this State, with the view of enlarging a part, at least, of such circuits, and decreasing the number of said circuits—on condition of making such act, as might now be passed, take effect as to judicial service on the 1st day of Jan'y, 1875." The question, as I understand it, involves the power of the legislature at its present session to pass a general law re-districting the State, so far as judicial circuits are concerned.

The 14th section of the 6th article of the Constitution is the provision which is supposed to inhibit this power, the concluding clause of which is: "No judicial circuit shall be altered or changed at any session of the General Assembly next preceding the general election for said judges." This provision is certainly a peculiar one, and its effect may be conceded to be not very clear. Construed literally, it might seem to apply to a general law, dividing the State into new circuits and abolishing the old ones, but this construction would lead to such difficulties and inconveniencies, not to use so harsh a word as absurdities, that we are forced to look for some other interpretation. If this provision were designed to prohibit the Legislature from re-districting the State into judicial circuits at a session preceding the general election for

judges, the consequences would be, to say the least, exceedingly embarrassing and perhaps injurious to the public interests, and really subversive of the power manifestly intended to be left with the legislative department. For, if the legislature cannot re-district the State at this session, prior to the general election fixed by the constitution, when can it be done? At the next session, the circuit judges in the old circuits will have been elected for six years, and if the General Assembly then wish to re-district the State, they must pass a law to go into effect six years after its passage. Such a law would be a mere work of supererogation. The Legislature could not foresee the changes in the condition of the State, as to population, wealth and business, six years in advance; and its enactment would be at all events repealable by the succeeding Legislature, and thus the Legislature might go on until the session just preceding another election, and there the power ceases when alone it could be made effectual. And thus, upon this construction, the circuits of judges, fixed by the law first passed after the adoption of the Constitution, would be a finality. We cannot believe that such was the intention of the Constitution, and we are, therefore, compelled to seek some other interpretation, which, though not so consonant with the words, may at least carry out the spirit and intent of this singular inhibition. Why the legislature shall have been prohibited from making changes in judicial circuits at a session just preceding the general election for judges, is only a matter of conjecture. Such conjecture must necessarily be based upon a belief, that the prohibited power was liable to abuse. It may have been thought, that, if the power to change the circuits, in which elections for judges were to be held, was allowed, it might be abused to provide for some legislative favorite, or to get rid of some obnoxious judge; and by adding counties to the circuit or taking counties from it, this purpose could be accomplished. I am unable to conjecture any other reason for such a provision. This reason, it will be perceived, applies only to special changes in particular circuits, when the circuits are left in existence and judges are still to be elected for them. "No judi-

cial circuit shall be altered or changed at any session of the General Assembly next preceding the general election for said Judges." That is, the circuit cannot be changed, when a judge of that circuit is to be elected, and the circuit is still, in a modified form, retained. Does this prevent or prohibit the adoption of a new system *in toto?* If the old circuits throughout the State are abolished, such abolishment to take effect, as suggested by the resolution, on the 1st day of January, 1875, and no provision is made for any elections in the circuits as they now stand, but such elections are expressly or impliedly prohibited, and elections are provided for in the new circuits in Nov., 1874, I am unable to perceive any motive or reason that could have prompted the framers of the Constistitution to inhibit such a law.

The circuits, as they now exist, are not changed, but totally abolished. The judges continue to perform their functions within them until the expiration of their term of office, and in January, 1875, there are no such circuits in existence, and the terms of the judges in them have expired, and no provision is made for the election of new judges in said abolished circuits.

What motive could be suggested for prohibiting the Legislature from re-casting the judicial circuits in the State, by a general law, at a session just anterior to the elections? It would seem, for various reasons readily occurring to any one, to be the most appropriate time for such a law. We cannot believe, that after the Legislature has once designated the number of circuits and their boundaries, that it was intended that the number could never afterwards be diminished or increased; yet a diminution of the number of the circuits, after the election of judges in them for six years, results in burthening the State treasury with the salary of all the judges, who, by the redistribution of circuits, have no duties to perform. It is not necessary for us to say, in this opinion, that the abolishment of a circuit leaves the tenure of the judge untouched and his right to a salary still valid. This question was discussed in the case of The State to the use of Vail vs. Draper, 50 Mo., 354, and various authorities are cited to show that such is

the law. But the question was not decided there, nor is it necessary to give an opinion here. I only refer to it to show, that a law, re-districting the State into judicial circuits, after the election of judges in the old circuits, would involve embarrassing questions—all of which are avoided by such an enactment as is suggested in the resolution of the Senate.

It is, therefore, the opinion of the judges, that the Legislature, at their present session, have the power to pass such a law as is suggested in the resolution of the Senate, and that the inhibition in the Constitution, which has been referred to, was not designed to apply to such laws, but to special enactments changing circuits with a view to legislate some particular judge out of his circuit or put some particular aspirant in it. The sole object of the laws, which the resolution of the Senate specifies, would be and could only be to effect a change in the policy of the State, as to the number of judicial circuits supposed to be needed, whether an increase or diminution is regarded as most conducive to the public interest.

I am authorized by all the other judges to say that they concur in this opinion.

W. B. NAPTON,
(On behalf of the Supreme Court.)

JOSEPH D. SHEWALTER, Respondent, *vs.* GUSTAVE PIRNER, *et al.*, Appellants.

1. *Conveyance, by bank—Execution—Signature of president.*—A deed by its terms was made by the Farmers' Bank of Missouri in its corporate name, and was signed by in the usual form, concluding as follows:

"In witness whereof I, Stephen G. Wentworth, as president of the Farmers' Bank of Missouri, by direction of the Board of Directors have hereunto subscribed my name and caused the common seal of said bank to be hereto affixed this 23rd day of February, 1866. (Signed,) S. G. Wentworth, President of Farmers' Bank of Missouri." The official seal of the bank was affixed at the proper place.

Deed held to be that of the bank (Wagn. Stat., 273, § 5). It was unnecessary that it should be signed in the corporate name of the bank by its president.

It is the affixing of the corporate seal that gives the assent of the corporation and establishes the validity of the deed.

2. *Deeds—Description of property—Vagueness of—Land known in community, how—Parol evidence as to.*—Parol evidence is admissible to show that land described in a sheriff's deed is well known in the community by the description given in the deed, however vague the description may appear. And if such can be shown to be the case, so that it can be seen that persons could not be misled or deceived by the description when applied to the actual premises in question, and that no sacrifice of the property could be produced by the description in the deed, it will be held sufficient to pass the title.

3. *Deeds—Description—False calls referring to known monuments—May be rejected when.*—Where there is a false call, demonstration or description in a deed, although it refer to known monuments, if the false description can be rejected and leave sufficient description to identify the land, the false description should be rejected, and the remainder will pass the land.

4. *Corporation—Power to hold land—Question not to be tried collaterally.*—After a corporation, that has the power to hold land, has purchased real estate, and the conveyance has been regularly executed to the corporation, it is not competent for the court, on the trial of a suit in ejectment for the recovery of the land, to decide the collateral question whether it was a violation of its charter for the corporation to receive the conveyance.

Appeal from Common Pleas Court of Lafayette County.

Ryland & Son and X. Ryland, for Appellants.

I. The deed of the Farmers' Bank of Mo. to Jeremiah Bear, trustee for Susan C. Baer, being signed by the president of the bank, was properly executed and ought to have been received in evidence. It is the seal of the corporation attached to the deed that makes it the act of the bank, it purporting on its face to be the deed of the bank. (Johnson vs. Musser, 42 Mo., 74; Wagn. Stat., 273, § 5; Sug. Vend., [Old 2 Am. Ed.] 501–2; Perry vs. Ruggles, 1 Mo., 349; Ang. and Am. Corp., [6 Ed.], §§ 225, 226; Pitman vs. Kintner, 5 Blackf., 250; Haven vs. Adams, 4 Allen, 80.)

II. It has long been the settled rule of law in this State, that parol evidence is admissible to show that the property conveyed by sheriff's deed is well known by the description therein contained, however vague the description may appear. The object of description is to prevent sacrifice of property, and the property in controversy is sufficiently well known by the description given. (Hart vs. Rector, 7 Mo. 531;

Webster vs. Blount, 39 Mo., 500, and cases there cited from our own court.)

III. The court had no right to inquire in this proceeding into the power of the Farmers Bank to purchase this property. Conceding that the bank had no authority to hold the real estate; there being no express prohibition against buying, the corporation having bought the real estate in dispute, its title acquired was indefeasible for the purposes of alienation, and defeasible only at the instance of the State of Missouri, while undisposed of by the corporation, by direct proceedings against the corporation. The court below therefore erred in rejecting the sheriff's deed, on the ground that the bank had no right to purchase, and in so declaring the law at the instance of respondent. (People vs. Mauran, 5 Denio, 389; Chatauque Co. Bk. vs. Risley, 19 N. Y., 369; Banks vs. Poitaux, 3 Rand. [N. Y.], 139; Sil. Lake Bk. vs. North, 4 John. Ch., 370; McIndoe vs. City of St. Louis, 10 Mo., 573; Union B. R. R. Co. vs. East Tenn. R. R. Co., 14 Ga., 327; Farmers' & Millers' Bank vs. Detroit & Mil. R. R. Co., 17 Wis., 372; Regents of University vs. Detroit Y. M. Society, 12 Mich., 138; Land vs. Coffman, 50 Mo., 243; Ang. & Am. Corp., §§ 152-3; 2 Kent. Com., 282; Merchants Bk. vs. Harrison, 39 Mo., 433; Blunt vs. Walker, 11 Wis., 334; Sherwood vs. Rock River Bank, 10 Wis., 230.)

J. D. Shewalter, for Respondent.

I. The sheriff's deed to the bank is void for uncertainty in the description. Known and fixed monuments called for in a grant will control the courses and distances called for in the same instrument. (Campbell vs. Clark, 6 Mo., 221; Campbell vs. Clarke, 8 Mo., 553; McGill vs. Somers, 15 Mo., 80; Wittelsey vs. Kellogg, 28 Mo., 404; Kronenberger vs. Hoffner, 44 Mo., 192; Hall vs. Davis, 36 N. H., 569; Bruckner's Lessee vs. Lawrence, 1 Doug., 19; Wendell vs. Jackson, 8 Wend., 183; 4 Kent's Com., 466 [11 Ed.] and n. 1; 1 Cow., 613; Bell vs. Hickman, 6 Humph., 398; Evans vs. Green, 21 Mo., 170; Jennings vs. Brizeadine, 44 Mo., 332.) "Fronting Pine

street," being a call for a monument, must govern in locating the lot over the call "north of Turners Hall," and, as no lot can be located opening with both calls (they are irreconcilable), the latter must be excluded. As the lot sued for does not front Pine street, but only extends back to an alley, it is not embraced in the sheriff's deed. In the construction of deeds where there are several calls, courts will, if possible, reconcile all; but where this is impossible, that which is most certain will govern. (Clemens vs. Rannells, 34 Mo., 581; 6 Barb., 258; same case 474; Dana vs. Midellesex, 10 Met., 250; Howe vs. Bass, 2 Mass., 379; Miller vs. Cherry, 3 Jones Eq., 25.)

II. The deed, if good as a private grant, would not be good as a sheriff's deed. Greater certainty is required in sheriff's deed. "It should be premised that the same presumption of intendment cannot be inferred from a sheriff's deed, as from a direct conveyence by grantor." (Nelson vs. Broadhack, 44 Mo., 603; Evans vs. Ashley, 8 Mo., 184; Simmonds vs. Catlin, 2 Cains, 65; 13 Johns., 532.) Sales by process of law must be governed by very different rules from ordinary conveyances. It must be so described, "that purchasers may know what specific land is put up at auction, and where it lies." (Hart vs. Rector, 7 Mo., 534.) In the present case no witness pretends that it describes any specific lot, and even Wentworth says, it embraces the whole strip of probably a hundred or more lots. In private conveyances equities attach, and these equities "will be enforced by just rules of construction." In sheriff's deeds, however, there is no agreement, no equities, nothing to which the owner has assented, and nothing to be inferred against him.

III. It is admitted that however vague the description in a sheriff's deed, parol evidence is admissible to show that in the neighborhood it is well known by the description given, but if it is shown that a large tract or parcel of land is well known by a certain designation, (*e. g.* Blackacre,) this of itself will not pass a small indefinite portion of such tract. (Ashley vs. Evans, *supra;* Jackson vs. Delancy, 18 John., 107; Jackson

vs. Rosvelt, 13 John., 97; Thockmorton vs. Moore, 10 Ohio, 44; 1 Swan [Tenn.], 375; 4 B. Mon. 211; 1 H. & Gil., 172.)

IV. But in this case parol evidence was not admissible to identify the premises,—the ambiguity was patent; it appeared on the face of the deed. The ambiguity was patent, the deed void, and could not be aided by parol. (Hardy vs. Mathews, 38 Mo., 121; Campbell vs. Gabriel, 44 Mo., 448; Jennings vs. Brizeadine, *Ib.*, 333; Hall vs. Davis, 36 N. H., 569; 1 Green, § 297; Broom's Legal Max., 23; Sug. Vend., 18 [Am. Ed., 1836.] The deed to the bank is to a lot "fronting Pine." Parol evidence is not admissible to show that it was intended to convey the lot sued for, which fronts Cedar. The ambiguity is patent, or more properly is a description of a totally different lot.

V. But the parol evidence admitted did not identify the premises, no witness could from the description identify the "specific property" sought to be conveyed, so it was void. They all attempt to locate it by the call for "North of Turners Hall," excluding the call for "fronting Pine Street."

VI. The bank under its charter had no power to become the purchaser of the property. (Dartmouth College vs. Woodward, 4 Wheat., 518; Beaty vs. Knowby, 4 Pet., 152; St. Louis vs. Clemens, 43 Mo., 404, and cases cited by court; Ruggles vs. Collier, 43 Mo., 375; Pacific R. R. vs. Seeley, 45 Mo., 212, and cases cited; Merchants Bank vs. Harrison, 39 Mo., 433.)

VII. It cannot now be said, that the powers of the bank to take and hold this real estate cannot be inquired into, for three reasons: 1st. The appellants, who claim under the bank, went voluntarily into the question of the powers of the bank under its charter to take this real estate, both by attempting to show that the judgment debtors were indebted to the bank at the time of the purchase, and also by an instruction as to its powers, the refusal of which is here assigned as error. Nowhere is it assigned as error that the court could not in this proceeding, go into an examination of the powers of the bank,

but on the contrary the appellants voluntarily went into the question. 2nd. The restriction imposed on the bank is by a general law, and not by its charter. 3rd. This is a sale under process of law, and not a private grant. As to the powers of corporations in collateral proceedings, see Calloway Mining Co. vs. Clarke, 32 Mo., 305; Bank of Ed'ville vs. Simpson, 1 Mo., 129; 2 Mo., 171; Haynes vs. Carrington, 13 S. & M., 411; Whitman Mining Co. vs. Baker, 3 Nev., 391; Life & Fire Ins. Co. vs. Mechanics' Ins. Co., 7 Wend., 34; Bank of Mich. vs. Niles, 1 Doug., 401 [though this was a case for specific performance]; Leazure vs. Hilligas, 7 Serg. & R., 319; Chatauqua Bank vs. Risley, 4 Denio, 488; Rock River Bank vs. Sherwood, 10 Wis., 230; Camden & Amboy, R. R. vs. Com. of Mansfield, 1 Zeb., 510; Downing vs. Mount Wash., 4 N. H., 230; Argenti vs. San Francisco, 16 Cal., 253; Dana vs. Bank of St. Paul, 4 Minn., 385; White Bank vs. Toledo Ins. Co., 12 Ohio St. 601. Their powers are to be strictly construed. (Rice vs. R. R. Co., 1 Black, 358.)

Vories, Judge, delivered the opinion of the court.

This was an action of ejectment, brought by the respondent against Gustave Pirner to recover the possession of a lot of lands described in the petition as follows:

Being in the city of Lexington, Lafayette county, State of Missouri: "Beginning at a point in the west side of Cedar street in the said city, forty-six feet north of the north-east corner of block number thirty-six, as known and designated on the plat of the first addition to the town of Lexington, now on file in the recorder's office for said county of Lafayette; and being the north-east corner of a piece of land sold by William S. Field to Joseph Traxell, and running thence in a westerly direction, with the line of said land so sold to said Traxell, one hundred and forty-six feet to a point in a private alley left by said Field, and being the north-west corner of said lot so sold to said Traxell, thence in a northerly direction on a line paralled with said Cedar street thirty feet nine in-

ches to the section line between sections thirty-three and twenty-eight in township fifty-one of range twenty-seven, thence east with said section line one hundred and forty feet to a point in the west line of said Cedar street, thence along the said line of Cedar street twenty-nine feet and seven inches to the place of beginning." The petition is in the usual form.

After the commencement of the suit the defendants, Jeremiah Bear and Susan Bear, were made parties defendant at their own request.

The defendants by their answers deny the allegations of the petition, except that the possession of defendant Pirner is admitted; while defendants Bear and wife charge that their co-defendant is rightfully in the possession of the premises as their tenant. Both parties claim to derive title to the premises in controversy through and from George Shewalter and Jeremiah Bear. The plaintiff claims by virtue of a deed from George W. Shewalter and Josiah Bear and his wife to Joseph Shewalter, dated Feb. 10th, 1863; and by deed from Joseph Shewalter to Joseph W. Shewalter (the plaintiff), dated October the 4th 1870.

The defendants claim by virtue of a sheriff's deed, by which the title and interest of George Shewalter and Jeremiah Bear is attempted to be conveyed to the Farmers Bank of Missouri: the land having been sold by the sheriff by virtue of two judgments rendered in the Lafayette Circuit Court, one in favor of the Merchants Bank of St. Louis and against George Shewalter and Jeremiah Bear *et al.*, dated May 24th 1862, for $382; the other in favor of Lee H. Warriner, and against George W. Shewalter and Jeremiah Bear, dated Nov. 27th, 1862, for $672; and executions thereon, which were in due time issued and levied on the land in controversy by the description of "a house and lot, situate on a strip of ground between the first addition and Anderson's addition to Lexington and fronting Pine street, and north of the Turners' Hall in the city of Lexington; lying and being situate in Lafayette county, Missouri:" and by a deed from the Far-

mers Bank of Missouri to Jeremiah Bear, as trustee for Susan Bear, dated February 23rd, 1866. A trial was had before the court, a jury being waived by the parties. After the plaintiff had closed his evidence in the cause, the defendants read in evidence a deed from the Farmers Bank of Missouri to Jeremiah Bear, as trustee, for the land in controversy, dated Feb. 23rd, 1866. The defendants then offered in evidence a judgment and execution thereon, and the levy and return of the sheriff thereon, in a cause of the Merchants Bank of St. Louis against George W. Shewalter and Jeremiah Bear, *et al.*, rendered in the Lafayette Circuit Court on the 24th day of May, 1862, for $382.93.

The plaintiff objected to these records being read in evidence, because the execution was not levied on the premises in controversy. This objection being overruled he excepted.

The defendant then offered in evidence the transcript of a judgment and execution, &c., rendered in the Lafayette Circuit Court in favor of one Warriner against George Shewalter and Jeremiah Bear, rendered on the 27th Nov. 1862, for $672. This was also objected to for the same reason that is given above, and the objections overruled and exceptions saved. The defendants next offered in evidence the sheriff's deed conveying the interest of said Bear and Shewalter in the premises in controversy, by the description in the levy aforesaid, to The Farmers Bank of Missouri by virtue of the said executions and judgments. To the introduction of this deed the plaintiff objected, on the ground that it did not convey the land in controversy, and second, that the sale did not take place at the proper term of the court. These objections were overruled, and the deeds admitted in evidence.

The defendant then introduced several witnesses, who testified that the premises in controversy are well known, in the community and neighborhood where they lie, by the description in the levy made by the sheriff and in the sheriff's deed, that is to say "lying and being situate in the county of Lafayette, in the State of Missouri, to-wit: also a house and lot, situated on a strip of ground between the first addition and An-

derson's addition to Lexington fronting Pine Street, and north of Turners Hall in said city of Lexington," as it was by the description in the petition in the cause; that the "strip" was well known by that name, being an irregular strip of ground lying between the two additions named; that said strip is crossed by streets and alleys; that the house and lot in question is on said strip, and is between Cedar Street and Pine street; that the part of said strip lying between these two streets is laid out intofourlots, that the lots are divided by an alley running parallel with said streets and is at an equal distance from each, leaving two lots on each side of said alley; the two lots lying east of the alley fronting on Cedar street, and those on the west fronting on Pine street; that Turners Hall is situate on the south lot that fronts on Cedar street; that the lot in controversy lies immediately north of the Turners Hall lot, and is the only lot on said strip north of Turners Hall; that the house on said lot is the only house north of Turners Hall on said strip; that the Turners Hall lot, at the time of the sale, was fenced with a tight plank fence the north fence, being the south line of the lot in controversy; that the lot in controversy at the time of the sale was fenced, the fence adjoining the north fence of the Turners Hall lot, but that the north fence of the lot in controversy included a strip, that did not belong to it, but constituted an alley on the north which was included by the fence; that no part of the lot fronted on Pine street, but the rear end of the lot was at least one hundred and fifty feet from Pine street; that Turners Hall is a public hall and well known in the whole neighborhood; that the lot could easily be found and designated by the description in the deed.

Witnesses on the part of the plaintiff testified, that the lot could not well be ascertained by the description in the deed, but the difficulty stated seemed to grow out of the fact, that the size of the lot was not given in the description, and that it was falsely and mistakenly stated to front on Pine street. It was also shown, that the lots on the strip referred to had always in conveyances been described by metes and bounds,

and not designated as lots by their numbers or blocks, and that the premises in question were the only part that George Shewalter and Bear ever owned of said "strip"; that they erected a frame dwelling house on the lot, which was on it previous to, and at the time of, the sheriff's sale. Evidence was also introduced by the defendant, tending to show that George Shewalter and Jeremiah Bear were indebted to the bank at the time of the sheriff's sale, as indorsers for others.

The plaintiff introduced evidence in rebuttal, tending to prove, that George Shewalter and Jeremiah Bear, previous to the sheriff's sale, had a settlement with the "Farmers Bank of Missouri," and extinguished all indebtedness from them to the bank. The acts of the Legislature incorporating "The Farmers Bank of Missouri" at Lexington, and relating to banks, etc., were given in evidence, so far as they applied to said Farmers Bank.

The court, after hearing all of this parol evidence and said acts of the legislature, excluded the deed of the "Farmers Bank of Missouri" to Jeremiah Bear, as trustee of Susan Bear, for the lot in controversy, on the ground that the deed was not executed by the bank, but overruled the ground of objection that the land was not sufficiently described. The defendant at the time excepted. The court also on motion of plaintiff excluded the deed from the sheriff of Lafayette county to the "Farmers Bank of Missouri," on the ground that the bank was not authorized to purchase said real estate, and that no title could therefore vest in the bank by virtue of said sheriff's sale and deed. The defendants again excepted.

The court, at the request of the plaintiff at the close of the evidence, declared the law as follows: "That unless the court believes from the evidence, that the 'The Farmers Bank of Missouri,' at the time of said sheriff's sale, to-wit: On the 25th day of May, 1864, was the owner of the said judgment in favor of the 'Merchants Bank of St. Louis' against said Wyatt Arnold and others, and said judgment in favor of said Lee H. Warriner against said Jeremiah Bear and George W. Shewalter, and the debts evidenced thereby, or one of

said judgments and debts, and that said 'Farmers Bank' became and was the purchaser of the part of said strip of land mentioned in the said sheriff's deed, in order to secure its debt or debts, evidenced by said judgments or one of them, such bank could not purchase such real estate at said sheriff's sale, and the said sheriff's deed to said 'Farmers Bank of Missouri' conveyed no title to said part of said strip of land to said 'Farmers Bank of Missouri,' unless the court further believes, and finds from the evidence, that said part of said strip of land was required for the convenience and accomodation of said bank or its branches, or was conveyed by the owner thereof to said bank in payment of a debt or debts previously contracted in good faith and without a view to the purchase thereof."

The defendants objected to this declaration of law, and, their objection being overruled, they again excepted. A judgment was then rendered by the court in favor of the plaintiff, for the possession of the premises in controversy, and damages.

The defendants in due time filed their motion for a new trial, and assigned among other causes; "that the court rejected competent, legal and proper evidence offered by the defendant;" "that the court rejected the deed from the 'Farmers Bank of Missouri' to the defendant, Jeremiah Bear as trustee for the defendant, Susan Bear, his wife, dated 23rd of Feb., 1866;" that the court made illegal and improper declarations of the law on the part of the plaintiff, and refused legal and proper declarations of law asked for by the defendants. The court overruled the defendants' motion for a new trial, and the defendents again excepted, and appealed to this court.

There are but few points presented by the record in this case necessary to be considered by this court, for if the deed offered in evidence by the defendants from the "Farmers Bank of Missouri" to Jeremiah Bear, as trustee for Susan Bear, and the deed from the sheriff of Lafayette county to the said bank, were properly excluded as evidence in the cause, then the declarations of law given were properly given,

and those refused were properly refused, and judgment was properly rendered in the cause for the plaintiff. In such case it would be unnecessary to examine any further points in the case. On the other hand, if these deeds were improperly rejected, the judgment must be reversed without regard to any minor points raised on the trial of the cause.

The deed, offered in evidence from the "Farmers Bank of Missouri" to Jeremiah Bear, was objected to and exeluded, because it was held by the court below that it was not the deed of the bank, not having been executed by the bank, but being signed by its president. This deed, by its terms, is a deed by the bank in its corporate name, as party of the first part, and is in the usual form, and concludes as follows: "In witness whereof, I, Stephen G. Wentworth, as president of the 'Farmers Bank of Missouri,' by direction of the board of directors, have hereunto subscribed my name, and caused the common seal of said bank to be hereto affixed, this 23rd day of February, A. D. 1866.

S. G. WENTWORTH,
President of Farmers Bank of Missouri."

The official seal of the bank is affixed to the deed at the proper place. But it is contended, that the deed should have been signed in the corporate name of the bank by the president. This objection is wholly untenable. The deed is executed after the exact form prescribed by our statutes (Wagn. Stat., 273, § 5), and the form used has been held to be good by a number of cases under similar statutes. (Pitman vs. Kintner, 5th Blackf., 250; Haven vs. Adams, 4 Allen, 80; Ang. and Am. Corp., § 225.) It is the fixing of the corporate seal that gives the assent of the corporation, and fixes the validity of the deed. (Perry vs. Price, 1 Mo., 646; 15 Wend., 256.) The deed was properly executed. It conformed to the directions of our statutes on the subject, and was improperly excluded as evidence by the court.

The next question to be considered is as to the propriety of the action of the court below in excluding from the evidence in the cause the deed of the sheriff of Lafayette county,

conveying the premises in controversy to the "Farmers Bank of Missouri." This deed was objected to on three grounds:

First. Because the description of the premises in controversy, as it appeared in the deed, was too indefinite and uncertain to identify the premises in controversy, and the deed was therefore void for uncertainty. Second. Because it appeared by the deed, that the sale by the sheriff did not take place at the proper term of the court.

These objections were overruled, and the deed admitted in evidence; but the court, after hearing other evidence in the cause, tending to prove that the defendants in the execution, under which the sheriff sold the land, were not indebted to the bank, and that the bank had no interest in the executions or judgments under which the land was sold, excluded the deed from the evidence in the cause, on the ground that the bank was not authorized to purchase the land in controversy, and that no title therefore ever vested in the bank. It is insisted by the appellant, that as the two first grounds of objection were overruled by the Common Pleas Court, and no exceptions taken by the respondent, that they cannot properly be considered in this court; but I suppose, that if it should appear from the whole record that the deed had been properly excluded, although it may have been excluded for a wrong reason, this court would not reverse the judgment on that ground alone. Therefore all objections, made to the admissibility of the deed in evidence, are properly before this court for consideration.

The first question then is, was the description of the premises in controversy, as it appears in the deed, so uncertain and indefinite as to render the deed void for uncertainty, and whether the court could properly receive parol evidence to show that the premises were well known, and easily identified and discovered, by the description given?

It is settled in this State by a number of decisions of this court, commencing with the case of Hart vs. Rector, 7 Mo. 531, and ending with the case of Webster vs. Blount, 39 Mo., 500, that parol evidence is admissible to show that the land

described in a sheriff's deed is well known by the description given in the deed, however vague the description may appear. If the land sold is well known, in the neighborhood and community where it is situate, by the description in the deed and levy, so that it can be seen that persons could not be misled or deceived by the description when applied to the actual premises in question, and that no sacrifice of the property could be produced by the description in the deed, it will be held sufficient. In the case under consideration, the premises were described as "a house and lot situated on a strip of ground between the first addition and Anderson's addition to Lexington, fronting Pine street, and north of 'Turners Hall' in said City of Lexington, Lafayette county, State of Misouri."

The evidence shows, that this "strip" is well known, and has been well known for many years, that it is a narrow strip of land lying between the two additions named, that the strip is crossed by streets and alleys, that there are four lots laid off on said strip between Cedar and Pine streets, two fronting on Pine street, and two on Cedar street; that the lot in question is on the west side of, and fronts on, Cedar street, and not on Pine, but that it is the only lot on said strip lying north of "Turners Hall," that the Hall is a public building well known in the community where it is situated, that the "Turners Hall" lot and the lot in controversy are adjoining lots and both fenced in, and the most of the witnesses think that the lot could easily be found and ascertained by the description given in the deed. I think, that the evidence sufficiently shows that the description in the deed could mislead no one, and that the objection to the deed on that ground was properly overruled by the court below. (Henry vs. Matthews, 38 Mo., 121; Bates vs. Bank of Missouri, 15 Mo., 309; Landes vs. Perkins, 12 Mo., 238; Evans vs. Greene, 21 Mo., 170; McCune vs. Hull, 24 Mo., 570.)

It is however contended by the respondent in this case, that as the lot is described as fronting on Pine street, to show that it does not front on said street, but on Cedar street, is to contradict the deed, which is not permissible, and that Pine street,

being a natural monument, must control the remainder of the descriptive words in the deed. It is very true, that natural or known monuments will control courses and distances; but it is equally true, that where there is a false call, demonstration or description in a deed, and the false description can be rejected and leave a sufficient description to identify the land, the false description will be rejected, and the remainder of the description, being sufficiently certain, will be sufficient to pass the land. (Cooley vs. Warren, 53 Mo., 166.)

The main question in this case is, was the description in in the deed calculated to mislead or to produce a sacrifice of the property. I think that it was not. The next objection to the admissibility of the sheriff's deed is, that it appeared from the deed the sale did not take place at the term of the court to which the execution was returnable. It is only necessary to say in reference to this objection, that it appears from the sheriff's return read in evidence, that the levy was made on the land before the time fixed for the return of the writ, and that a sale took place as soon as a term of the court was holden at which the sale could take place, the same being done in exact conformity to the act of the Legislature of this State, passed at the session of the General Assembly holden in the year 1863. (Session Acts 1863, p. 20.) The next ground of objection to this deed, and the one on which the Common Pleas Court excluded the deed from the evidence in the cause, was that "The Farmers Bank of Missouri" was not authorized to purchase the real estate in question, and therefore that no title passed to the bank. It is contended by the respondent, that the bank can only purchase or hold real estate for the specific purposes named in the act of the Legislature creating banks, and that, in order to authorize the bank to receive or transmit any title to real estate, it must be shown, that it was purchased for the purposes named in the act. The act relied on is as follows: "Each bank may hold such real estate as may be required for the convenience and accomodation of the bank and branches, and such as may be conveyed to the same in payment of debts

previously contracted in good faith, and without a view to the purchase thereof; and also such as may be purchased at sales upon judgments and decrees in favor of the bank, when it shall be purchased in order to secure the debt. But the Bank shall as soon as practicable under the direction of the bank, dispose of all real estate held by it which is not necessary to the transaction of its business."

The declaration of law, given by the court in trying this cause, assumes that it must affirmatively appear to the court, that the land had been purchased by the bank under the circumstances, and for the purposes, named in the above quoted statute, or the deed attempting to convey the land to the bank will be held to be absolutely void; and that this matter can be collaterally tried and determined upon a trial of a suit of ejectment. It is admitted, that the powers of corporations should be strictly construed, and that they should not be permitted to exercise doubtful powers. But after a corporation that has the power to hold land has purchased land, and the conveyances have been regularly executed to the corporation, it is not competent for the court, on a trial of a suit of ejectment for the recovery of the land, to decide the collateral question whether it was a violation of the charter of the corporation to receive the conveyance. It is admitted, that there are some cases that may go to that extent, but the better authority seems to be, that the question as to the validity of the title can only be tried in a direct proceeding against the corporation for that purpose. It has been so settled by several cases decided by this court.

In the case of Chambers vs. The City of St. Louis, 29 Mo., 543, the question arose in a suit for partition, whether the City of St. Louis under her charter could take or hold land by bequest, for purposes not "necessary" for the purposes of the corporation. Judge Scott, in delivering the opinion of the court, uses this language: "Whether these lands are necessary for the corporation, is a question that can only arise in a proceeding instituted by the State against the City for abusing her right to purchase lands. The City has a power

to purchase. If that power has been exceeded, then it has been violated, and the City charter may be forfeited in a suitable proceeding; and until that is done, she will hold the land. The city may hold lands outside her limits for certain purposes. Shall she be compelled to contest, with every occupant who may get possession of them, her right to take and hold lands?"

This case was commented on, and fully approved by a late case in this court, where Judge Adams, in delivering the opinion of the court, in speaking of the amount of land that could legally be held by a railroad corporation under our laws, says: "But the amount of land it may receive cannot be decided between these parties; conceding the power to receive lands for the purposes aforesaid, no one except the State can raise the question as to the amount that may be received." (Land vs. Coffman, 50 Mo., 243, and cases there cited: McIndoe vs. City of St. Louis, 10 Mo., 576; Health Comm'rs. vs. Mauran, 5 Denio, 389; Ang. & Ames Corp., § 152; Silver Lake Bank vs. North, 4 Johns. Ch., 370.)

For the reasons, that the deed from the Farmers Bank to Jeremiah Bear, and the deed from the sheriff of Lafayette county to "The Farmers Bank of Missouri," were wrongfully excluded from the evidence in the case, the judgment of the Common Pleas Court of Lafayette county must be reversed. Judges Adams and Napton did not sit.

The other judges concurring, the judgment is reversed, and the cause remanded.

JANE STEWART, Respondent, *vs.* JAMES HADLEY, *et al.*, Appellants.

1. *Deeds—Covenant of warranty—Breach of—Mistake in conveyance of land—Defence of, etc.*—In suit on covenant of warranty, where it appeared that, contrary to the agreement of the parties, a certain tract of land, to which grantor had no title, was embraced in the deed, which grantor signed by inadvertence, *held*, that such facts were an equitable defence to the action.

Appeal from Johnson Court of Common Pleas.

Johnson & Botsford, for Appellants.

I. It is well settled in this State, that in a suit on a note, given for the purchase money of a tract of land, a plea alleging the want of title in the plaintiff is a good defense to the note to the extent of the value of the land so conveyed without title. (Wagn. Stat., 1061, § 24; Barr vs. Baker, 9 Mo., 850; Copeland vs. Loan, 10 Mo., 266; Smith vs. Busby, 15 Mo., 387; Doan vs. Moss, 20 Mo., 297; Ash vs. Holder, 36 Mo., 163; Wellman vs. Dismukes, 42 Mo., 101; Beaupland vs. McKean, 28 Penn. St., 124; Ferguson vs. Huston, 6 Mo., 407; Watt vs. Scott, 7 Mo., 509; Cross vs. Noble, 67 Penn. St., 74; Negly vs. Lindsay, 67 Penn. St., 217.)

II. In a proceeding of this kind it is not competent for a party to dispute the terms of his deed by showing by parol evidence that he intended to convey less or other lands than his deed actually called for. (Seaman vs. Hodgebom, 21 Barb., 398; Howes vs. Barker, 3 John., 506; Tymason vs. Bates, 14 Wend., 671; Jackson vs. Croy, 12 John., 427; Renner vs. Bank of Columbia, 9 Wheat., 581; Taylor vs. Riggs, 1 Pet., 591; McBurney vs. Cutlew, 18 Barb., 203; Jackson vs. Vanderhayden, 17 John., 167; Jackson vs. Steinberg, 20 John., 49; Swick vs. Sears, 1 Hill, 17; Arnot vs. McClure, 4 Den., 41; Brewster vs. Power, 10 Paige, 562; Simonds vs. Beachamp, 1 Mo., 589; Hogel vs. Lindell, 10 Mo., 483; Henderson vs. Henderson, 13 Mo., 157.) This was a proceeding under the statute and not in equity. (Fithian vs. Monks, 43 Mo., 502.)

Crittenden & Cockrell, for Respondent.

I. The appellant having full knowledge that respondent did not own the acre of land at the time of the sale and that she did not then sell or pretend to sell the same, but declared that she had no control over it, he cannot with clean hands take advantage of the error of the scrivener in drawing the deed, and recover the value of the acre of land, and the church building thereon. No fraud is imputed to the respondent in the sale.

II. Appellants are certainly limited to the purchase money of the one acre and interest. In this State, this is the measure of damages. (Tapley vs. Labeaume's Exr., 1 Mo., 550; Martin vs. Long, 3 Mo., 392; Colgan vs. Sharp, 4 Mo., 263; Collins vs. Clamorgan, 6 Mo., 169, Dunnican vs. Sharp, 7 Mo., 71; Collins vs. Gamble, 10 Mo., 467; Reese vs. Smith, 12 Mo., 344; Henderson vs. Henderson, 13 Mo., 151; Beecher vs. Watkins, 13 Mo., 521; Mosely vs. Beach, 15 Mo., 322; Lawless vs. Collier, 19 Mo., 480; Dickson vs. Desere, Adm. 23 Mo., 157; Guinotte vs. Chouteau, 34 Mo., 154; Rawle Cov. [3 Ed.,] 319.)

III. The land, not including the one acre and the church building, was of the full value of the consideration money, to-wit: $3200. It does not appear that the church building and the acre of land induced appellant to make the purchase, and to permit him to secure a recoupment as he demands, would be inequitable and offensive. (Rawle Cov. [3 Ed.,] 658.)

IV. The words "more or less" in the deed from respondent to appellant are qualifying words as to quantity conveyed, and the deficiency of one acre, in the remote corner of the tract, bears no such erroneous disproportion to the quantity conveyed as will justify the prayer of the appellants. (27 Mo., 563.)

Vories, Judge, delivered the opinion of the court.

This action was brought to recover a balance on a promissory note, and to foreclose a mortgage executed to secure the payment of the amount due thereby. Jane Stewart (the plaintiff) in the month of January, 1866, sold and conveyed

to the defendant, James Hadley, a quarter section of land in Johnson county, supposed to contain 160 acres, for the sum or price of twenty dollars per acre or the aggregate sum of $3,200, fifty dollars of which was paid and the note sued on executed for the balance; the said Hadley and his wife at the same time reconveying the land to the plaintiff to secure the payment of the amount due by said note. The deed by which the land was conveyed to Hadley contained the covenant of seizen and covenants of general warranty. At and before the conveyance of the land by plaintiff to Hadley, and in fact before the plaintiff even became the owner of the land, one acre thereof situated in one corner of the tract had been conveyed to certain trustees for church purposes, who then held the title to said acre of land. A house for worship had been erected on said land, and was then occupied and used by a congregation of the denomination of "Cumberland Presbyterians." No exception of this acre of land held by these trustees was made in the deed by which the land was conveyed to Hadley. This suit was brought to recover the balance of the purchase money for said land as evidenced by said promissory note, and to foreclose the mortgage executed by the defendants to secure the same. The defendants set up, by way of counter-claim as a defence to the action, a breach of the covenant of seizin and warranty contained in the deed from plaintiff to Hadley, by reason of the failure or the want of title in the plaintiff to the acre of land upon which said church building is erected, and they charge that said acre of land with the improvements thereon was at the time of the execution of said deed of the value of one thousand dollars, and judgment is asked thereon. The plaintiff by replication to defendants' answer admits, that the acre of land had been conveyed to the church trustees as is charged, and that they were the owners thereof, and had erected a house thereon at the time of the conveyance to Hadley; but she states that, previous to the sale and conveyance of the land by her to Hadley, she pointed out to said Hadley the boundary lines of said acre of land, and then told him, that the boun-

dary lines of the land then being sold to him did not include said acre of land upon which the church was erected, and that it had been previously conveyed to trustees for said church was well understood by Hadley at the time of his purchase; that he purchased said quarter section of land with the exception of the acre upon which the church stood, and that he consented thereto, and agreed to give the sum of $3.200 in gross for said tract of land less the one acre for church purposes; but that owing to a mistake of the scrivenor in drawing the deed, the whole of said tract of land was inserted in the deed with the addition of the words "more or less." The plaintiff further avers that, at the time she conveyed the land to Hadley, she did not know that the deed was so worded as to include the whole of said quarter section of land, nor did she know said fact until after the commencement of the suit. She alleges that the defendant James Hadley well knew at the time he purchased the land, that he was to receive only that part of it remaining unsold and unconveyed at the time; that, at the time of the sale and conveyance by plaintiff to defendant, she was not in the possession of, nor had she the control of, the one acre of land so used for church purposes; but that it was notoriously and visibly in the possession of the trustess of said church, which fact was known to defendant, and that she was only in possession of the remainder of said tract of land, and only sold and conveyed that part to defendant and delivered the possession of the same to defendant, which was all well known to defendant. The plaintiff also denies, that the value of said acre of land, with the improvements, was at the time one thousand dollars. The issues made by these pleadings were tried by the court, a jury having been waived by the parties.

The plaintiff introduced witnesses, whose evidence tended to prove that the land conveyed to Hadley by the plaintiff was at the time of the conveyance worth the amount of the consideration paid therefor, without including the acre ot land on which the church building was erected; that said

land was worth $20 per acre, that defendant had after his purchase sold part of the land, and in the deed reserved the church property, telling the purchaser that he had a suit pending about the church property, that, when it was decided, he would give a quit claim deed for that; that, if he failed in his suit, it would give him time to pay the mortgage debt. The plaintiff was introduced as a witness on her own part. Her evidence was, in substance, that, at the time of the sale by her of the land to defendant, she resided on the land in the only dwelling house thereon, that there was a church house on the north-east corner of the land, which had been there for many years, that the church was in plain view of the dwelling house, that defendant came to see her twice about the land before he made the purchase, he asked the price of the land, she told him $20 per acre, he came back in about a week, when she told him that the church was on the tract of land, that she did not own the church and had nothing to do with it or the acre of land on which it was sitnate, that she did not know whether the acre of land had been deeded to the church or not, that Hadley said he would take the land, that they would go to town and make the deed in a few days. She afterwards went to Warrensburg, and made the deed. She told Hadley that she would deed the land just as it was deeded to her, that she did not sell the church house, and told Hadley particularly, that she would not sell it, that she did not estimate the value of the church in affixing a price on the land, that she told Hadley so afterwards, that it was not her intention to convey the church, and that she did not receive any consideration therefor; that the defendent was to pay her $20 per acre for the land; that there was nothing said about the value of the church being included, that Hadley always told her that he did not want the church; that he told her two or three times, the last time after the deed was made; that she would not have taken $20 per acre for the land if she had owned the church; she always told defendant that the church house was not hers, and that she would not sell it. She did not know that the acre of

land had been conveyed to trustees, until long after she had conveyed the land to defendant.

As the foregoing evidence was introduced by the plaintiff, the defendant objected to each part thereof on the ground that it was incompetent, and irrelevant, and attempted to contradict and invalidate the deed set forth in the answer. The court overruled the objections and admitted the evidence, to which the defendant at the time excepted. The defendant then on his part introduced several witnesses,whose evidence tended to prove that the land, conveyed to Hadley without the acre upon which the church stood was worth a little less than $20 per acre. Some of the witnesses thought it to be worth that amount, some less. The evidence also tended to prove, that the acre of land conveyed to the church trustees, together with the house thereon, was worth from eleven to twelve hundred dollars, and that the value of the acre tract was, as compared to the value of the whole quarter section, about equal to from one fifth to one seventh part thereof. The defendant, James Hadley, being sworn, in his evidence contradicted the evidence of the plaintiff, except as to his knowledge that the church was on the tract of land purchased, but stated that plaintiff said she had purchased and owned the entire quarter section of land, including the church acre, and that she had sold and conveyed it all to him, and that it was doubtful whether he would have taken the land at the price agreed on, without the acre on which the church stood. This being all of the evidence on either side, the court, at the request of the plaintiff, declared the law to be:

1st. "That if the court believe from the evidence, that on the——day of——A. D. 186—, plaintiff sold, conveyed and delivered possession of the land to the defendant as set forth in the pleadings, and that defendant was in person upon the land before purchasing the same, and saw and examined the land he was purchasing, and did purchase the same at and for the consideration of $——, and after the bargain was consummated became possessed of the land and has not been disturbed in the possession of any part of the same by any person or body

of persons claiming an adverse or superior title to the land or any part of the same, then the court will find for the plaintiff, and assess the damages at the balance due on the notes given by the defendant as an evidence of indebtedness for the deferred payment on said land, with interest as specified in said note."

2nd. "If the court believes from the evidence, that plaintiff sold the land, as described in the pleadings, to defendant and conveyed the same to him on the—day of—A. D. 1868, by a deed containing the usual covenants of warranty, and after such conveyance defendant went into possession of the land and is still in full possession of all said land, and that defendant, after the purchase thereof, executed and delivered to plaintiff a mortgage upon all of said land, as described in deed of plaintiff to defendant, to secure deferred payments for the land, then the court must find for the plaintiff, although it should believe from the evidence, that there was a deficiency of one acre of land in the quantity conveyed to the defendant by plaintiff, as the vendee must look to the covenants contained in said deed for such deficiency."

3rd. "If the court should believe from the evidence, that defendant before purchasing the land went on the land, examined its boundaries and monuments, saw the building standing on a part of said land, and that he was informed before purchasing the land that it was a church building, either by knowledge communicated to him by other or by the general appearance of said building, and the defendant considered the tract of land purchased, less that occupied by the church, of the value of the consideration so paid for it, then the court will find for the plaintiff, unless the court should further find that, prior to the sale and conveyance of the land to defendant, plaintiff had actual knowledge of the existence of the deed for the land on which the church building stood, from grantor of plaintiff to some party or parties, for church purposes, and by fraud and deception sold and conveyed for a valuable consideration said acre of land, on which the building was erected, to defendant as hers, when she knew at the

time of the sale to defendant that it had been conveyed to others."

The defendants objected to each of these declarations of law so given, and at the time excepted. The defendants on their part then asked the court to declare the law to be as follows:

"That if the court finds from the evidence, that plaintiff did on the—day of—186–sell and convey the land in controversy, to-wit: * * * * * to defendant by a deed containing covenants of warranty and seizin, and if the court further find that, at the time the deed was made by plaintiff to defendant, she was not the owner of a part of the land in controversy, and could not convey the same to defendant, then the court declares the law to be, that the covenants of warranty and seizin in plaintiff's said deed were broken as soon as made, and that said defendant is entitled to recover in this action, as damages for breach of said covenants, the actual value of the part of said property, including the appurtenances thereto belonging, to which the title has failed." The court refused to declare the law to be as asked by the defendants, and the defendants again excepted. The court then on its own motion declared the law to be as follows:

"For a breach of the covenants of seizin the measure of damages is the consideration given and received, and if the court believes from the evidence, that the land sold by plaintiff to defendant falls short of the quantity sold and described in plaintiff's deed to defendant, then there has been a breach of the covenants, and the defendant is entitled to a rebatement to the amount of the value of the deficiency of the land so conveyed. To the giving of the said declaration of law by the court, the defendants also, at the time, excepted. The court then rendered a judgment in favor of the plaintiff for the sum of $1415, and foreclosing the equity of redemption in the mortgaged land, &c. The judgment is as follows:

"Now at this day, the cause again coming on to be heard, the same having been taken under advisement by the court,

and the court now being sufficiently advised of and concerning the same, doth find the issues for the plaintiff, and the facts to be; that said defendant James Hadley by his promissory note, dated on the ninth day of January, 1866, promised for value received to pay the plaintiff the sum of thirty-one hundred and fifty dollars on or before the first day of March next thereafter, with interest thereon after maturity at the rate of ten per cent. per annum; and that the said defendants James Hadley and Almira M. Hadley, who was and is the wife of her co-defendant, James Hadley, for the purpose of securing the payment of said note, executed, acknowledged and delivered to plaintiff their mortgage deed, wherein and whereby they conveyed to said plaintiff a certain tract and parcel of land, including the inchoate right of dower of said defendant Almira M. Hadley, situate in the county of Johnson and State of Missouri, and described as follows, to-wit: The north east quarter of section No. fourteen (14) in township No. forty-six (46) of range No. twenty-five, containing 160 acres more or less; upon the following condition to-wit: That if the said James Hadley, his executors or administrators, should pay the sum of money specified in said note, and all the interest that might be due thereon, according to the true tenor and effect of said note; then said conveyance to be void; otherwise to be and remain in full force, and virtue in law." "And the court doth further find, that said defendants have not kept and performed the conditions on their part to be performed, and that there is now due, and unpaid on said note, both principal and interest, the sum of fourteen hundred and fifteen dollars. It is therefore considered, ordered and adjudged by the court here, that said plaintiff have and recover against said defendant James Hadley the said sum of fourteen hundred and fifteen dollars, so found due by the court as aforesaid, with interest thereon from and after the date of the rendition of this judgment, at the rate of ten per centum per annum, together with her costs and charges in this behalf sustained. And that the equity of redemption" &c.

After the rendition of this judgment the defendants

filed a motion for a new trial, which being overruled they appealed to this court.

It is evident from the record in this case, that the trial was had and conducted to final judgment under a misapprehension of the law, and without any reference to the issues in the case. The petition was founded on a note for thirty-one hundred and fifty dollars. The petition admitted that three payments had been made on the note, amounting in all to $1450, and claimed that the balance with the interest was due plaintiff, for which judgment was prayed. There was also a prayer for the foreclosure of the equity in the mortgaged premises. The answer of the defendants did nor controvert any allegation in the petition, but set up a breach of a covenant of seizin in a deed to a tract of land, which was the consideration of the note sued on, by which breach defendants claimed to have lost title to, or that he received no title to, one acre of the land conveyed, by which damages had resulted, which damages were set up as a counter-claim to the action. The plaintiff replied to this counter-claim and did not deny the sale of the land nor the execution of the deed with the covenants charged, nor that the title had failed to the acre of land as charged in the answer, but she states in avoidance of the covenant of seizin as to the acre of land to which she had no title and as to the right of plaintiff to recover damages therefor, that the acre of land included in her deed to which she had no title, had erected thereon a building for church purposes; that it was notorious that the church building was situate on said acre of land; that it was a conspicious building well known to defendant, and that he knew that it was not intended by plaintiff either to sell or convey said building or acre of land to the defendant, and that therefore she was not bound by said covenant in said deed as to said acre of land or the improvements thereon; that said church and acre of land were not included in the sale made by her of said land to the defendant, but that the same was excepted therefrom, and intended to be so excepted in the said deed conveying the same; but that the deed was written so as to include said church and acre of

land by the mistake and oversight of the parties thereto and the person writing said deed.

This issue made by the replication to the defendant's answer was the only issue to be tried. The question was a question of mistake, and was in the nature of an equitable defense. This question of mistake should have been passed on by the court, and if the court had found, that the parties did not intend that this acre of land should be included in the deed, and that the defendant never intended to convey it by the deed, nor to make a covenant of seizin in reference thereto, and that by mistake or inadvertence she signed the deed with the acre of land included, contrary to the agreement or intention of the parties, then the plaintiff had a right to recover the whole balance due by the note sued on after allowing the credits stated in the petition, together with interest from the maturity of the note, unless some reason to the contrary exists, not apparent on the record. But if the acre of land was sold by plaintiff and intended by the parties to be included in the deed, or in other words if the plaintiff failed in this equitable defense to the defendant's counter-claim, then the defendant was entitled to have deducted from the balance due by the note sued on the damages sustained; the measure of damages being ascertained by finding the proportion that the value of the acre, to which there is no title, bore at the time of the sale to the value of the whole tract sold, and if it was one fifth of the value of the whole tract, then one fifth of the whole price agreed to be paid by the defendant for the land, with interest, should be deducted from the amount due on said note, and judgment rendered for the balance; and if the proportion of the value of the acre of land to the value of the whole should be more or less than one fifth, then the result would be varied by the same rule. It will be seen from the declarations of law given and refused, and by the finding and judgment of the court, that the only issue to be tried in the cause was wholly ignored. No finding is made as to the mistake in the deed either one way or the other, and no notice whatever taken of the counter-claim or the issues

made thereon. It cannot be told from the record, what was done, whether anything or nothing, or how much,was allowed on the counter-claim, and in fact the judgment and finding of the court is wholly inexplicable. If we look at the allegations in the petition, which are not denied by the answer, and by calculation see how much would have been due on the note sued on, calculating principal and interest, the amount due could not be less than twenty-four hundred dollars, perhaps more, and yet judgment is rendered for $1,415. Nothing appears of record, by which this reduction could be made in the amount due, except the counter-claim, and it appears to have been totally ignored in the finding of the court. The record suggests that there must be some mistake in the matter, either in the record or somewhere else. It is certain, that all of the declarations of law are incorrect, and show that the case was tried on a wrong theory of the law, and while declarations of law in this case were not appropriate, yet they served to show that the court acted on or was guided by a wrong theory in trying the case.

The judgment will be reversed, and the cause remanded, when it can be tried in conformity to this opinion, and a proper judgment rendered.

Judges Wagner and Sherwood absent, the other judges concur.

WM. A. RUGLE, Respondent, *vs.* MARTIN WEBSTER, Appellant.

1. *Administrators sales—Petition and Affidavits for.—Deed of land—Irregularities in, when cannot be impeached collaterally.*—In ejectment for land bought by defendant at an administrators sale, it appeared that the application for the sale of the land was made by an attorney of the administrator; that the petition was not accompanied with an account of the administration and a list of the debts due to and by the deceased and remaining unpaid, as required by the statute; that the affidavit to the petition and the report of the sale, and the deed to the purchaser, were made by the attorney and not the administrator. The deed contained all the statutory recitals. After

final settlement by the administrator, but before his discharge, he himself personally made a regular deed of the land to plaintiff; *held*, that although these proceedings and papers may have been irregular and might have caused a reversal in direct proceedings for that purpose, they could not be impeached collaterally.

The administrator may make such deed after final settlement and may at any time make proper correction of mistakes therein.

Appeal from Polk Circuit Court.

John S. Phelps, for Appellant.

I. The petition for an order of sale and the notice of the pendency of such application gave the court jurisdiction to order the sale of the real estate. (Overton vs. Johnson, 17 Mo., 442; Frye vs. Kimball, 16 Mo., 9; Vasquez vs. Richardson, 19 Mo., 96; Strouse vs. Drennan, 41 Mo., 289; Robert vs. Casey, 25 Mo., 584.)

II. The deed of Stiles, Adm'r. by his attorney is valid. The power of attorney was made and delivered after the court had approved of the sale to defendant, and the administrator could exercise no discretion in making the deed.

III. The deed of Stiles, adm'r, made by himself to defendant is valid and passed the title. It was urged by the plaintiff that after a "final settlement" an administrator ceased to have any authority pertaining to the estate. Such is not the law. If he has failed to make a deed before his final settlement, which he should make, he has power to make it then. (Wagn. Stat., 98, § 36. See also Shore's Adm'r. vs. Coons, 24 Mo., 553.)

IV. Where jurisdiction of the subject matter and of the parties in interest has been obtained by the court, error, or irregularities in its exercise cannot be impeached collaterally. (Thompson vs. Bloss, 2 Pet. 157; McVey vs. McVey, 52 Mo., 406; Tutt vs. Boyer, *Id.*, 425.)

John W. Ross & W. P. Johnson, for Respondent.

I. The office of an administrator is created by statute, and the duties devolving upon him cannot be delegated to another. (Broom's Leg. Max., §§ 806-7-8; Graham vs. King, 50

Mo., 22; Howard vs. Thornton, 50 Mo., 291; Perry on Trusts, 779 and notes; Bales vs. Perry, 51 Mo., 449; Farrar vs. Dean, 24 Mo., 16.) Under the statute the administrator's petition for the sale of the lands must be verified by himself, not by his attorney. Without such affidavit the court got no jurisdiction of the subject matter, and its subsequent proceedings were null and void. (Jarvis vs. Russick, 12 Mo., 63; Farrar vs Dean, 24 Mo. 16.)

II. The record shows no such appraisal and affidavit as required by the statute. (Wagn. Stat., 97, §§ 29, 30.)

III. The statute requires that real estate shall be appraised by three disinterested house-holders, and shall make an affidavit. The record should show that such affidavit was made, which is not done here. (Wagn. Stat., 97, §§ 29, 30.)

IV. After final settlement an administrator is no longer such for any purpose, and cannot make a valid conveyance of real estate, though legally sold during his administration. (State *ex rel*, vs. Stephenson, 12 Mo., 178; Caldwell vs. Lockridge, 9 Mo., 358.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment, brought by the plaintiffs in the court below, to recover the possession of certains lands lying in Polk county. The plaintiffs claim title as the heirs of one Isaac T. Davis, deceased, and the defendant claims by virtue of a purchase and deed made at an administrators sale, at which the land was sold to pay debts owing by the decedent. Judgment having gone for the plaintiffs in the Circuit Court, the case is brought here for review by appeal. In support of the judgment it is contended that the proceedings in the County Court taken by the administrator to procure a sale of the land, and the deeds made to the purchaser after the sale, were all entirely void, and that no title was conveyed. From the record it seems that the administrator did not reside in Polk county, where the estate was situated and the administration was had, and that the application for a sale of the land for the payment of debts was made by an attorney,

duly employed and authorized by the administrator, and acting in his behalf and stead. The petition presented to the court, although making the necessary averments, was defective in not being accompanied with an account of the administration, and a list of the debts, due to and by the deceased, and remaining unpaid, as the statute requires. The affidavit as to the truth of the petition was also made by the attorney instead of the administrator in person, and the affidavit appended to the report of the sale was also made in like manner. When the petition was presented to the court, the sale of the decedent's land was ordered and notices of the sale were regularly given, and the sale took place during a session of the Circuit Court, and at a proper time. The defendant was a purchaser of the land sued for, and paid the purchase money. At the next term of the County Court a report of the proceedings and sale were duly made, and the sale was approved. The administrator, by his attorney in fact, then executed to the defendant a deed, conveying the land, which contained all statutory recitals, and was duly acknowledged and recorded. After the execution of this deed the administrator made a final settlement showing a balance in his hands due the estate, but nothing further appears to have been done, and there was no order of record discharging him from his trust. While the record was standing in this shape, and subsequent to the final settlement, the administrator in person made a deed to the defendant as purchaser of the land in controversy, which was regular in all its forms, was properly acknowledged and recorded.

The above, in substance, contains all the facts necessary to be noticed in the case. Although the proceedings may have been irregular, and the affidavits not made in literal compliance with the law, yet there are not such jurisdictional facts as would render them wholly void. Sufficient cause might have existed for a reversal in a direct proceeding brought for that purpose, but certainly there is no ground for a collateral impeachment. In the case of Overton vs. Johnson, (17 Mo., 442,) it was held, that the accounts, lists, inventories and

appraisements which the statute requires to be filed with a petition for the sale of a decedents real estate, are not necessary to give the court jurisdiction, and that a failure to file them would not render the sale void. The court, speaking through Gamble J., said: "The jurisdiction is acquired by filing a petition praying the court to do an act or make an order which under the statute the court is competent to do. Whether the petition is in proper form, or sets forth sufficient facts, or is accompanied with the proper evidence, the court will decide in the exercise of its jurisdiction."

It was for the court, when the petition was presented, to determine its sufficiency, and if it made an erroneous decision, the proper remedy was by appeal. The report of the sale was made at the next term after it was had, and the sale was approved. This was the term designated by statute and all the interested parties were then in court, and for any irregularity or injustice an appeal was open to them. When the sale was approved, it only remained for the administrator to perform the ministerial duty of making to the purchaser a deed. Whether the administrator could exercise the act of making a conveyance by delegating the authority to another person to do it in his stead, is a question upon which I have doubts, but it is unnecessary, however, to decide it in this case. If we treat the first deed as a nullity, there was another one made by the administrator, which was entirely good and conveyed the title. But it is objected that this deed was made after final settlement, and therefore the administrator had no longer any authority to act. This objection cannot be sustained. After the approval of this report it was a duty that devolved upon him. If he attempted to execute it, and did it imperfectly, he might make the proper correction at any time. (Kiley vs. Cranor, 51 Mo., 541.) But, so far as the record shows, he was still administrator when he made and acknowledged the second deed. It is true he had made his final settlement, but it is not shown that he was discharged by the court. He still had money in his hands belonging to the estate. No order of distribution was made, and he remained within the control and jurisdiction of the court.

The present case is clearly distinguishable from Caldwell vs. Lockridge, (9 Mo., 358,) where the administrator made his final settlement and then resigned. It was there held that after final settlement and resignation of his office, he was no longer in court. But as in this case there was neither a discharge by the court, nor a resignation by the administrator, we think he was still acting in an official capacity. (See McVey vs. McVey, 51 Mo., 406.)

The judgment should be reversed and the cause remanded. The other judges concur.

J. F. JONES, Plaintiff in Error, *vs.* MARSHALL GIBSON, Defendant in Error.

1. Writ dismissed for want of final judgment.

Error to Callaway Circuit Court.

L. W. McKinney, for Defendant in Error.

J. F. Jones, per se.

NAPTON, Judge, delivered the opinion of the court.

In this case there is no final judgment, indeed no judgment final or interlocutory. The final entry on the record is "the parties appear, and the demurrer being heard is overruled, and the cause is continued."

The writ of error is dismissed. The other judges concur.

B. F. HULSEY, Plaintiff in Error, *vs.* THOMAS WOOD, Defendant in Error.

1. *Ejectment—Statute of limitations—Burden of proof.*—Plaintiff in ejectment makes out a *prima facie* case by proving his legal title. It is not necessary for him to go further and show a possession that could not be defeated by the statute of limitations. If defendant relied on the statute, it was incumbent on him to prove adverse possession.

Appeal from Crawford Circuit Court.

J. R. Arnold, for Plaintiff in Error.

Clark & Seay, for Defendant in Error, relied on Nelson vs. Broadhack, 44 Mo., 596; Ellis vs. Murray, 28 Miss., 129; Sternes Real Act., 241; Jackson Real Act., 157.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment, and on a trial before the court, a jury having been waived, the plaintiff proved up a clear title to the premises. Whereupon the court, at the request of the defendant, declared the law to be, that it devolved upon the plaintiff to show that he, or those under whom he claimed, had been in possession of the land sued for within ten years next before the commencement of the suit, and the plaintiff having failed to show affirmatively that fact, he was not entitled to recover. A judgment was then rendered for the defendant, and the plaintiff sued out his writ of error.

It will be observed, that by this declaration the court not only required the plaintiff to prove a legal title to the land, but it required him to go further and to prove also, that he had a possession that could not be defeated by the statute of limitations. The court certainly mistook the law, and committed error in giving the declaration. When the plaintiff's evidence showed a legal title, he made out a case that entitled him to recover in the absence of countervailing testimony introduced in behalf of the defense. The defendant might have relied on the statute of limitations to defeat the action, but it would have been incumbent on him to have proved the

adverse possession. The case of Nelson vs. Broadhack (44 Mo., 596), which it is contended supports the ruling of the court, is not an authority for the position assumed. The real point decided in that case was that, the statute, where it operates, vests a good title; and that a defendant may avail himself of it by giving it in evidence without pleading it. This doctrine is well settled, and any other view is founded on a misconception.

Let the judgment be reversed, and the cause remanded. The other judges concur.

HENRY C. CLARK, *et al.*, Respondents, *vs.* WILLIAM G. ESTEES, Appellant.

1. *Supreme Court—Assignment of errors.*—Appeal dismissed for failure to file assignment of error, statement of brief, etc.

Appeal from Christian Circuit Court.

James R. Vaughan & D. M. Payne, for Respondents.

VORIES, Judge, delivered the opinion of the court.

The appellant in this case having failed to file any assignment of errors, or statement and brief in the cause, as is required by law, the appeal is therefore dismissed.

The other judges concur.

ANN M. EMISON, *et al.*, Respondents, *vs.* PHILANDER R. WHITTLESEY, *et al.*, Appellants.

1. *Land and land titles—Conveyances—Remainder—Life estate.*—A conveyance was made to A., in trust for the sole and separate use of B., a married woman, during her natural life, and upon her death the remainder in fee simple absolute to vest in the children of said B. and her husband then living, and the children of any of their children who should die before her death. *Held,* that as at the time of making the deed, no one could tell that any of the children would survive the mother, the remainder was only a contingent, not a vested remainder.
2. *Land and land titles.—Mortgages—Vendor's lien—Waiver of.*—A vendor's lien on real estate is not waived by taking additional security, where the instrument creating the security, in terms retains the vendor's lien. The implied lien will be sustained whenever the vendor has taken the personal security of the vendee only, by whatever kind of instrument it may be manifested; and any bond, note or covenant given by the vendee alone, will be considered as intended only to countervail the receipt for the purchase money contained in the deed, or to show the time and manner in which the paynent is to be made, unless there is an express agreement between the parties to waive the equitable lien. And on the other hand, the lien will be considered as waived whenever any distinct or independent security is taken, whether by mortgage of other land, or pledge of goods, or personal responsibility of a third person; and also where a security is taken upon the land, either for the whole or a part of the unpaid purchase money, unless there be an express agreement that the implied lien shall be retained.

Appeal from Lafayette Circuit Court.

Green & Rathbun, for Respondent.

Ryland & Son, and Wallace & Mitchell, for Appellants.

I. To constitute a vested remainder, the person who takes must be *in esse* and ascertained by the instrument creating the same. This deed from Wm. J. Stone to Wyatt H. Stone as trustee, does not name or ascertain the children or grandchildren who are to take the remainder in said estate. The remainder created by said deed, could not vest till the death of Mary V. Stone, and was therefore contingent till that time. (2 Washb. Real Prop. [3rd Ed.], 502, § 89, 507, § 10, 509, §§ 18, 20, 22; 4 Kent's Com., 206, 207, 208; Blackst. Com., Book II., 169; Brown vs. Lawrence, 3 Bush, 390, 397; Leslie vs. Marshall, 31 Barb., 564; Croxwell vs. Sherrud, 5 Wall.,

288; Aubuchon vs. Bender, 44 Mo., 560, 566, 567; Moore vs. Littel, 3 Amer. Law Reg., 144, 146, 148; Fearne on Rem. Introd., 2; 4 Kent., 203, Note C.; 2 Cruise Dig., Title 16, Ch. 1, §§ 8–10–40; Pink vs. DeThusey, 2 Mad. 157; 3 *Ib.* 396; Hill on Trus., 72, 490.)

II. The waiver of the equitable lien by vendors, when not expressly done, is a matter of intention and presumption, subject to explanation and rebuttal, and the courts in some of the States consider this lien itself in the nature of a mortgage. (Mackrette vs. Symmons, 15 Ves., 329; White & Tudor Leading Cases in Equity, Vol. 1, 194 [S. P.], Amer. notes to same at pp. 270, 272, 274; 2 Washb. Real Prop. [3d Ed.] pp. 88, 91, [S. P.] 505–508; Adams vs. Cowherd, 30 Mo., 458 460–1; Davis vs. Lamb, 30 Mo., 441; Wallace vs. Wilson, 30 Mo., 335; Bledsoe vs. Gaines, 30 Mo., 448; Ficklin vs. Stephenson, 33 Mo., 341; Boon vs. Ewing, 17 Ohio., 500; Morris vs. Pate, 31 Mo., 315.)

Napton, Judge, delivered the opinion of the court.

This is an action of ejectment. The plaintiffs are the representatives of Mary V. Stone. In 1856, W. J. Stone executed a deed to Wyatt H. Stone for the land in controversy, "in trust for the sole and separate use of Mary V. Stone (mother of the plaintiff), wife of Oliver H. P. Stone, Sr., to hold for and during her natural life, so that neither the same nor the rents and profits thereof should in any way be controlled by or become subject to any debts of his contracting, and upon the death of the said Mary V., the remainder in fee simple absolute in said lands to vest in the children of the said Oliver H. P. Stone, Sr., of their marriage begotten, then living, and in the children of the deceased children of the said Oliver H. P. Stone and Mary V. Stone, if any of the children of the said Oliver and Mary die, leaving a child or children, giving to them the share that would have gone to the parent."

In 1858, Wyatt H. Stone was, by a decree of the Circuit Court, discharged from the duties of trustee, and one Jno. S. Porter appointed, and a deed was made by Wyatt H. Stone to

Porter, conveying the premises on the same terms as heretofore specified. There were some mechanic's liens on this property, but they were discharged. The defendants relied on a decree of the Circuit Court, made in November, 1862. The petition in the case which terminated in this decree, states that O. H. P. Stone executed certain notes, specifying them, as evidence of his indebtedness to the plaintiff for the purchase money of the land above referred to.

It then states the mortgage to secure these sums, executed by the defendants, Stone and wife, and the trustee, and refers to the deed that he had made, conveying the land to the trustee for the benefit of the wife and children, and then states that the defendants, John Milton Stone, Ann Mary Stone, O. H. P. Stone, Jr., William Dudley Stone and Ira Stone are the children by this marriage and are minors. The petition then refers to the mechanic's liens and their purchase by Van Camp, one of the defendants, who was the grandfather of the infant defendants. The prayer of the bill is for a judgment for his debt and interest, that the defendants be foreclosed of their equity of redemption, and that the land be sold to pay this debt, and for other relief.

The mortgage expressly recites that the said W. J. Stone has only a vendor's lien on the said tract of land to secure the purchase money, and as he was in failing circumstances, the deed was made for further security. The infant defendants were duly served, and their grandfather, Levi VanCamp, was appointed guardian *ad litem*. This mortgage was executed on the 25th of November, 1858, by Oliver H. P. Stone, Sr., Mary V. Stone and her trustee Wyatt H. Stone, to W. J. Stone. The suit to foreclose was by W. J. Stone against Oliver H. P. Stone and his wife Mary V., and Wyatt H. Stone, trustee, and John S. Porter, trustee, and John Milton Stone, and Mary Stone, Oliver H. P. Stone, Jr., W. Dudley Stone, Ira Stone, plaintiffs, and Levi VanCamp, grandfather of plaintiffs. There was a decree of foreclosure and order of sale in November, 1862. The mortgage was to secure the purchase money on the sale by said W. P. Stone to Wyatt H. Stone as trustee, in 1856, The deed was filed for record in 1858.

The decree in this suit for foreclosure, finds the sum of $3,241.69 to be still due on the bonds of said Stone, "for part of the consideration and purchase money which said defendant, Oliver H. P. Stone promised and agreed to pay the plaintiff, W. J. Stone, for the tract of land above described, and which defendant, O. H. P. Stone, bought of plaintiff, W. H. Stone, and which plaintiff, W. J. Stone, had heretofore, but after said purchase, conveyed by deed, at the request of said O. H. P. Stone, to said Wyattt H. Stone, in trust for the defendant, Mary V. Stone, during her natural life, and after her death to the defendants in said suit, John Milton Stone, Ann Mary Stone (now Ann Mary Emison), O. H. P. Stone, Jr., William Dudley Stone and Ira Stone, children of the said O. H. P. Stone, Sr., and his wife, Mary V. Stone." And further, that in respect to the purchase of said land by O. H. P. Stone, Sr., and plaintiff's conveyance of the land in trust to defendant, Wyatt H. Stone, for the use of the wife and children of the purchaser, that the purchase money for said land was never paid, but still remains due and unpaid. This decree further finds, that said mortgage deed, dated the 23rd of March, 1858, executed by said O. H. P. Stone, Sr., Mary V. Stone and Wyatt H. Stone, was made to secure the original purchase money for said land to said W. J. Stone, plaintiff in suit for foreclosure, and was in aid of the lien which plaintiff, W. J. Stone, as such vendor, had and retained in and upon said land and real estate. And it was considered and ordered by said court on said decree, that the defendants, each and all of them, be forever foreclosed and barred from all benefit and advantage of redemption of, in and to said mortgaged premises and real estate, and that the same and the equity of redemption therein and thereto of said defendants be sold to satisfy the amount found to be due to said plaintiff as aforesaid, and that said plaintiff have thereof execution specially against said mortgaged premises, and that the same or so much thereof as shall be necessary, be sold to satisfy the said debt, damages and costs, with a further judgment, in case not enough was rendered, against O. H. P. Stone, Sr. The defendants

had the sheriff's deed under the execution, which showed the sale at $3,711.60, on the 24th of May, 1864. The deed was dated June 4th, 1864. There was some testimony in the case, perhaps not material, but which tends to explain the meaning and intent of the parties.

W. J. Stone, the original owner of the land, states that he made the contract with O. H. P. Stone, Sr., his brother, for the sale of this land; that said O. H. P. Stone was to pay him $5,000, and he was to make his brother a deed for the land. The deed he did make was to Wyatt H. Stone, trustee, though he was not aware of this when he signed it. No money was paid. Judge Ryland was also examined, but his testimony is not material. He drew up the mortgage and intended it as an additional security to the lien of the vendor.

Various instructions were asked on either side, presenting the points controverted, but it is useless to repeat them. The questions to be decided, and which the instructions on either side present, are, 1st, whether the deed of W. J. Stone created a vested contingent remainder in the children of O. H. P. Stone, Sr. 2nd, whether the decree in the case of W. J. Stone against the present plaintiff and others, had any validity as regards them, or passed any title to the land, except the life estate of their mother.

This was a conveyance to the mother, and upon her death the remainder was conveyed to her children who survived her, and the children of such of her children as were dead, at her decease. At the time of the deed, it was impossible to say that any one was in existence who would take the remainder. No one could tell that any of the children would survive the mother. It was, therefore, a contingent remainder. (In the matter of Ryder, 11 Paige, 185; Blanchard vs. Blanchard, 1 Allen, 226; Jones vs. Waters, 17 Mo., 589.)

But the main point in the case is as to the effect of the decree upon the title of the plaintiffs. As the plaintiffs were not parties to the mortgage, its foreclosure could not affect them. But the proceeding on the equity side of the court in the case of W. J. Stone to recover his notes for the purchase money of

the land was not merely to foreclose the mortgage, but to enforce a vendor's lien. The mortgage was not a substitute for this lien, but in aid of it, as it professed to be in its recitals. An express lien on a part of the the title conveyed is no waiver of the implied lien of a vendor. The mortgage could only affect the life estate owned by those who signed it. The petition, proceeding and decree clearly show that the court not only foreclosed the mortgage, but enforced the vendor's lien. Such lien is not waived by taking additional security, if it is in terms retained—and the mortgage in this case expressly stated that it was in aid of the vendor's lien. The infant defendants were made parties, and a guardian, *ad litem*, was appointed. This, among other things, clearly shows that it was the intention of the court to pass the whole title. Whether the infants would be barred by the proceeding, or might, after arriving at age, take steps to set aside the decree in a direct proceeding for that purpose is no question here. This action is ejectment and assumes the decree in the case of W. J. Stone vs. O. H. P. Stone and others, to be a nullity, so far as the plaintiffs, who were infant defendants in that case, are concerned. But the vendor's lien was paramount to the title of the infants, whether it be regarded as a valid or contingent remainder, unless it was waived by taking the mortgage. The result of the American cases on the subject is thus stated in Lea. Eq. cases, p. 272: "The implied lien will be sustained wherever the vendor has taken the personal security of the vendee only, by whatever kind of instrument it may be manifested, and therefore, any bond, note or covenant given by the vendee alone, will be considered as intended only to countervail the receipt for the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien; and on the other hand, the lien will be considered as waived whenever any distinct and independent security is taken, whether by mortgage of other land, or pledge of goods, or personal responsibility of a third person, and also, where a se-

curity is taken upon the land, either for the whole or a part of the unpaid purchase money, unless there is an express agreement that the implied lien shall be retained."

Adopting this as the received American doctrine, for which the editors cite a multitude of cases, it will be perceived that the lien in this case was never waived, but expressly reserved. The mortgage purports to be in aid of the lien, and its foreclosure and the decree to sell the whole title show that the decree was based, not only on the mortgage, but upon the vendor's lien. It was useless to make the plaintiffs parties defendants to that suit, unless such had been the object. The prayer for general relief authorizes the decree that was made, which was for the sale of the whole title. The facts stated in the petition, and proved on the trial, warranted the decree, and the title acquired under it by deed of the sheriff, was a title in fee simple and not for the life estate. The plaintiffs had really no interest in this land in equity, unless paid for by their father, the grantee in the deed. The purchase money was never paid, and they were parties to a suit to enforce its payment. The defendants are purchasers under a decree in this suit to sell this land, not merely under the mortgage, but to enforce the vendor's lien, and this title we regard as paramount to that of plaintiffs.

The judgment will, therefore, be reversed. The other judges concur.

WM. T. GENTRY, *et al.*, Plaintiffs in Error, vs. MARY E. ROBINSON, *et al.*, Defendants in Error.

1. *Fraudulent Conveyances—Creditors—Participation in frauds. etc.* A purchaser at an execution sale becomes invested with all the rights of the creditor, and is clothed with all his remedies against fraudulent contrivances of the execution debtor. But those who become interested in the property without participating in the frauds are not affected by them.
2. *Sheriff—Power of sale passes legal title.* Where a power of sale is conferred on the Sheriff by the parties to a deed of trust, the execution of the power transfers the legal title.

Error to the Common Pleas Court, of Lafayette County.

Wallace & Mitchell, for Plaintiffs in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery, to set aside a conveyance of certain lands in or near Waverly, in Lafayette County, made to the defendant, Mary E. Robinson, and one Sarah E. Wilhite. The object of the action was to set the conveyance aside, so far as Mary E. Robinson was interested, that is, as to one undivided half of the lands. The leading facts, as established by the admissions in the pleadings and the evidence, are, that the defendant, Wm. F. Robinson, at and before the time of the conveyance to his wife, Mary E. Robinson, was largely indebted and in insolvent circumstances: that he had no means whatever to invest in lands. He however, together with Wilhite, contracted with the defendant, Sternitzky, for the purchase of the lands, and, as they had no money to pay for the lands, they applied to David Hinton, and he would not loan the money without personal security. The defendants, Oscar Miles and Olcott Bulkley, agreed to be their security, provided a deed of trust was given on the lands to save them harmless from the payment of the note to be given for the purchase money. The loan was made on these terms, and the money was invested in the lands in dispute, and a deed taken therefor to the wives of Robinson and Wilhite, who, about a year afterwards, in pursuance of the original understanding, joined with their husbands in executing the deed of trust in favor of Miles & Bulkley. This deed of trust was executed to the Sheriff of Lafayette county, as Trustee, for the purpose of saving Miles & Bulkley harmless as security on the note given for the money to buy the lands. When the note matured, Hinton brought suit and obtained judgment on it against Miles & Bulkley, and their lands were levied on to pay the judgment, and each of them paid their share of the whole judgment, amounting to over three thousand dollars ($3,000). Afterwards they ordered a sale under the deed of trust, and the acting Sheriff of La-

fayette county foreclosed the deed of trust and sold the lands, and Miles & Bulkley became the purchasers at $3000.00, and the Sheriff, as trustee, executed to them a deed for the lands. In the mean time, and just before the purchase and conveyance to the wives of Robinson and Wilhite, Woods, Christy & Co., to whom Robinson was indebted, brought suit on a note which they held on him, and afterwards obtained a judgment. After this judgment was obtained, the deed of trust referred to was made to the Sheriff to secure Miles & Bulkley as above stated. Afterwards, the lands in dispute were sold at execution sale under the judgment of Woods, Christy & Co., and the plaintiffs bought them for the price of twenty-five dollars, and took a Sheriff's deed therefor, and commenced this suit.

The court rendered a decree in favor of Miles & Bulkley. A motion for a new trial was made by the plaintiffs and overruled. Exceptions were also taken during the trial to the admissibility of some evidence, and to the refusal of the court to quash certain depositions, which it is unnecessary to detail, or to pass upon, as the leading facts are sufficiently demonstrated by the other testimony and the admissions of the pleadings.

The principle, that an insolvent debtor cannot convey away his property to hinder and delay his creditors, is well settled both at law and in equity. A deed made for that purpose is absolutely fraudulent and void as to creditors. Nor can a debtor, by any contrivance, invest his funds in property, and have it conveyed to his wife, or any other person, to hinder and prevent his creditors from reaching it. All such contrivances are fraudulent and void as to creditors. It is equally well settled, that a purchaser at execution sale becomes invested with all the rights of the creditor, and is clothed with all his remedies against such fraudulent contrivances. But it is also well settled, that sureties and others, who become interested in the property without participating in the fraudulent designs of the debtor, are not affected by his fraud. The very money, which was invested in the property in dispute

was procured on the credit of Miles & Bulkley, with the understanding that they were to be saved harmless by a deed of trust on the property; and the deed of trust made to the Sheriff in their favor was to effectuate the original purpose.

There is nothing in the evidence that tends to prove that these sureties participated in the alleged fraud. And therefore, whatever may have been the ultimate designs of the debtor, Robinson, their rights remained secure.

The point is made by the counsel for plaintiffs, that, as the deed of trust was made to the Sheriff of Lafayette county, it is void for uncertainty in the grantee, that the Sheriff, as such, could not take as trustee. The deed of trust was made for the benefit of the sureties and transferred the equitable estate to them beyond any question. Whether the Sheriff took the legal title or not, is wholly immaterial. A power of sale was conferred on the Sheriff by the parties to the deed, and the execution of this power transferred the legal estate. (McKnight vs. Wimer, 38 Mo., 132.)

During the pending of the case in the Common Pleas Court, the defendants amended their answer. The plaintiffs then claimed a continuance at the cost of the defendants, which the court denied. The plaintiffs then filed an affidavit for a continuance on account of his amendment, the costs to abide the result of the suit. The court granted a continuance at their costs, and they excepted to this order for costs.

As the case was finally determined against the plaintiffs, it is unnecessary to pass on this point.

Judgment affirmed. Judges Napton and Vories concur: Judges Wagner and Sherwood absent.

SABINA SHROYER, Defendant in Error, *vs.* WM. A. NICKELL, *et al.*, Plaintiffs in Error.

1. *Ejectment by widow—Defective deed by married woman, reformation of, etc.*—In ejectment brought by a widow to recover certain land held by defendant under a defective conveyance made by plaintiff and her deceased husband, defendant, by his answer, prayed for a decree, reforming the deed, for specific performance, etc.; *held* by the court, that, as the property at the time of the defective deed was not plaintiff's separate property, and had not been conveyed by her in form and manner required by the statute, the deed, as to plaintiff, was null and void and could not be reformed; *but held*, that the court should, while rendering judgment for plaintiff for possession of the premises, also award to defendant the value of the permanent improvements on the land, together with the purchase money paid for the land by plaintiff's grantee, minus the value of the rents and profits collected by defendant while in possession.

Error to Saline Circuit Court.

Strother & Shackelford, for Plaintiffs in Error.

I. The conveyance of George W. Allen to Presly Shroyer and wife vested the title to the real estate sued for in both as one by the entireties. Both must join in any contract or conveyance to invest the title as a quasi corporation. (12 Mo., 385.) Hence, the statute, prescribing the mode in which a married woman may convey her real estate, has no application to the case. (R. C., 1855, 342, § 35.) Therefore, the two together, making a contract or conveyance, may and can do so, just as any other person, so that an executory contract signed by both will be enforced against either or the survivor.

II. Even in case of an executory contract by husband and wife, in relation to sale of her real estate, in which the purchase money is received and lasting improvements made, this court has held, that, before the land can be recovered in ejectment, the purchase money must be repaid and the lasting improvements paid for. (50 Mo., 228.)

III. In all the cases in which the courts have decided that a court of equity will not correct an error in a married woman's deed, the land was owned by the wife in her own right. Certainly, the court will not follow the precedents by extending the rule to cases like the present against manifest justice.

Boyd & Davis, for Defendant in Error.

I. The title to the whole or any interest in the land could only pass by a deed, in which Shroyer and his wife joined, duly acknowledged in accordance with the statute of this State. It is well settled, that a married woman can only dispose of her interest in real estate in this State by deed, in which her husband joins with her, duly acknowledged in conformity with the statute.

II. A court of equity will not enforce a contract made by a *feme covert* for the sale of real estate, unless it be executed and acknowledged in the manner prescribed in the statute, nor will a court of equity interfere to amend or correct any mistake in the contract or to make it conform to the statute. (Huff vs. Price, 50 Mo., 228; Carr vs. Williams, 10 Ohio, 305; Martin vs. Dwelly, 6 Wend., 9; Doe vs. Howland, 8 Cowan, 278; Knowles vs. Canley, 10 Paige Ch., 343; Jackson vs. Sears, 10 Johns., 435; Jackson vs. Stevens, 16 Johns., 110; Johns vs. Reardon, 11 Md., 465; Chauvin vs. Wagner, 18 Mo., 544; Wannall vs. Kem, 51 Mo., 150.)

Sherwood, Judge, delivered the opinion of the court.

Action of ejectment in the Saline Circuit Court brought by plaintiff, Sabina Shroyer, against defendant, Wm. A. Nickell, to recover possession of the W. half of the North-East Quarter of Sec. 16, T. 50, Range 21.

To this action, on his application, Wm. Prior was also made a party defendant, and thereupon the defendants answered jointly, pleading the general issue, and also, as a special and equitable defense, they alleged, in substance, that defendant, Nickell, was rightfully in possession of the land sued for; that on the 11th day of October, 1858, Presly Shroyer, the husband of plaintiff, purchased of George W. Allen the premises in question for the sum of $1,200, paid out of his own funds by said Shroyer; that Allen, in consideration of that sum, conveyed the real estate so sold to the husband and wife jointly, and in such way that they became and were seized as one person of the land thus conveyed; that Shroyer and his wife, on

the 21st day of September, 1861, in consideration of the sum of $1,300, duly paid to them, contracted to sell said land to Wm. C. Randolph, and on that day, in accordance with such contract, attempted to convey to Randolph, by a deed duly signed and acknowledged, the land they contracted for, but by mistake of the scrivener the land was described in the deed so made as the W. half of the South-East Quarter, &c., instead of W. half of the North-East Quarter, &c.; that Shroyer and wife were not the owners of the land thus erroneously described and mentioned in the deed to Randolph; that Randolph, on the 16th day of March, 1864, sold the land thus purchased from Shroyer and wife to defendant, Prior, but, in attempting to convey the same to Prior by deed, made the same mistake in regard to the proper description of the land as had been made in the deed from Shroyer and wife to Randolph; that the mistake in the deed from Randolph to Prior was duly corrected by an appropriate decree in favor of Prior against Randolph's heirs; that Prior has, since his purchase from Randolph, sold and conveyed, by a correct description, the land in controversy to defendant, Nickell, who, in good faith and believing he had acquired a title thereto, entered into the possession of such land, and made valuable and lasting improvements thereon to the amount of $1,025; that by reason of the premises, Nickell was in equity and good conscience entitled to the tract of land in controversy, and that plaintiff, as the survivor of her husband, holds the legal title in trust for defendant Nickell. The answer concluded with a prayer for reformation of the deed of Shroyer and wife to Randolph, for specific performance, and for other and further relief.

The portion of the answer setting up the equitable defense was successfully demurred to, and upon trial had, evidence was adduced, conducing to show a chain of title from the State of Missouri to George W. Allen, and from Allen to Shroyer and wife by deed which conveyed the property in suit to them jointly, that plaintiff was the survivor of her husband, and that Nickell was in possession of the premises.

The defendant introduced no evidence, and the court found

and rendered judgment for the plaintiff for possession of the land and for one cent damages. After an unsuccessful motion for a new trial, this cause comes here on a writ of error.

The sufficiency of the defendants' equitable defense is the only question the record presents for our consideration; and this necessitates the discussion of the following points:

First—The power of a court of equity to effectuate the reformation of a deed of conveyance where a married woman is named therein as a grantor, and more especially in the case before us.

Second—If it shall be ascertained that no such power, as applicable to the present case, exists, is the defendant in possession absolutely without redress?

Third—If not without redress, what is the measure of relief which can be afforded him?

These points will be considered in the order indicated.

The reformation of deeds and of contracts, whether sealed or otherwise, executed or merely executory, is one of the most familiar doctrines pertaining to equity jurisprudence. But it is to be observed of this power of reforming instruments, that it always has for its basis the fact that the parties thereto are capable of making a valid contract. This capability cannot be, in general, affirmed of a married woman. The only exception to this rule of incapacity, so far at least as it concerns her individual rights, is where a *feme covert* contracts with regard to her separate estate; for in respect to that, she is held a *feme sole* by courts of equity. But beyond this, the original inability to make a binding contract still exists in all its ancient vigor, save where modified by statute. It was one of the fundamentals of common law, that the contract of a *feme covert* was absolutely void, except where she made a conveyance of her estate by deed duly acknowledged, or by some matter of record; and this could only be done after private examination as to whether such conveyance was voluntarily made; and our statutory mode, whereby the deed of a married woman is executed and acknowledged, is but substitutionary of the common law method in this regard. This is the only change that our statute has wrought.

It follows as an inevitable sequence from these premises, that, aside from the exceptional case above noted, a *feme covert* is utterly incapable of binding herself by a contract to convey her land, either at law or in equity, except by compliance with the prescribed statutory forms. An attempted contract on her part is not such compliance, nor is her disappointed intention to convey clothed with those forms.

The effect of the deed from Allen to Shroyer and wife was such that the grantees in that conveyance each became seized of the entirety of the land granted, and the wife, being the survivor, took the whole estate by right of survivorship. (Gibson vs. Zimmerman, 12 Mo., 385; Garner vs. Jones, 52 Mo., 68; *Id.*, 72.)

There was then, in this case, no separate estate possessed by Mrs. Shroyer, as to which any attempted contract on her part could so operate as to be the subject of reformation. And as, aside from such separate estate, she could only make a valid contract by complying with the requirements of the statute, the legitimate conclusion must be, that a power of reformation does not exist in the present case, for the obvious and before stated reason, that there is no binding contract to furnish a basis for the operation of such power.

The deed, which Mrs. Shroyer in conjunction with her husband acknowledged, could, if possessed of any validity at all, manifestly be effectual but in one of two ways: either as a deed or a contract to convey. If as the former, then its sole effect as to her was to pass whatever of legal title she had to the land therein described and to none other. If as a contract to convey, then its effectiveness would consist in passing her equitable interest in the land intended to be conveyed, although not mentioned in the instrument which she signed. But as a mere contract to convey, it was utterly ineffectual, by reason of the incapacity before mentioned.

The positions here taken are fully supported by the following authorities: Carr vs. Williams, 10 Ohio, 305; Johns vs. Reardon, 11 Md., 465; Martin vs. Dwelly, 6 Wend., 9 & cas. cit.; Martin vs. Hargadine, 46 Ill., 322; Knowles vs. Canley, 10 Paige Ch., 342.

Having ascertained the non-existence of the power of reformation as applicable to the facts disclosed by this record, we will discuss the remaining points, as to whether the defendant, Nickell, is entitled to any relief, and, if so entitled, in what that relief consists. In Martin vs. Dwelly, *supra*, an action of ejectment was brought for certain lands, and the defendant filed his bill in chancery, alleging among other things, that the ancestors of plaintiffs in the ejectment suit were husband and wife, and had agreed to sell to defendant, and did sell to him the land in question, (which belonged to the wife) and conveyed the same to him under their hands and seals, and upon the purchase money being paid, signed a receipt therefor, and that the defendant verily believed that the money thus paid was applied to the use of the wife. The bill concluded with a prayer for specific performance, for an injunction, and for general relief.

The deed made to defendant was not acknowledged, and the Court of Appeals and Errors held, after an exhaustive and very elaborate review of very many authorities, both in England and in this country, that the complainant was not entitled to the relief prayed for, and affirmed the judgment of the lower court, but broadly intimated that the bill might be framed with a view to the recovery of the purchase money, and granted leave to amend the bill, evidently with the design of allowing such recovery. In Valle's Heirs vs. Fleming's Heirs, 29 Mo., 152, where land had been sold by the administrator and the sale was void, but the proceeds of the sale were applied to pay a mortgage debt, with which the land was encumbered, it was held, that the heirs were not entitled to recover in ejectment until they refunded the purchase money paid at the administration sale. And I confess my inability to distinguish any difference in point of principle between the case just cited and the present one, between a benefit indirectly applied and received by the removal of an incumbrance, and one directly conferred by the payment of the value of the land.

The petition states that the purchase money was "paid to

them," *i. e.*, Shroyer and wife, showing that the wife was benefited thereby to the extent of such payment; and is a stronger expression than the averment of a belief that the money was applied to the use of the wife.

The conclusion reached then is, that some redress can be afforded the defendant in possession, and I extremely regret that the measure of that redress is so inadequate, and that this cannot, by a direct interposition, prevent this action from being successful. The only relief, however, which can be afforded the occupant of the land in controversy, is this: That the judgment be reversed and the cause remanded, with directions to the court below to take an account of the rents and profits of the premises sued for, which have accrued since the assessment thereof by that court; that to this sum shall be added the damages already assessed; that an account be had and taken of the value of the permanent and lasting improvements made and placed by the present occupant of the land thereon; that a similar account be had and taken of the purchase money paid for said land by Wm. C. Randolph to Shroyer and wife, together with interest on said sum; that these accounts for improvements made and for purchase money and interest be added together and form one amount; that plaintiff be restrained from obtaining possession of the land, until she shall have paid to the defendant, Wm. A. Nickell, the value of said improvements, and also the said purchase-money and interest, diminished, however, by the amount of the rents and profits assessed as heretofore directed. And if Mrs. Shroyer shall have ousted the defendant, Nickell, by a writ of possession before this cause shall have been returned to the court from whence it came, such court will suitably modify the decree heretofore directed to be made. And it is further directed, that the plaintiff pay the costs of both courts.

All the judges concur.

G. A. WALTHER, Defendant in Error, *vs.* PACIFIC R. R., Plaintiff in Error.

1. *Damages—Railroad—Failure to fence—Injury—Presumption as to cause.*—In an action brought under § 43 of the Act, touching railroad corporations for killing of stock, (Wagn. Stat., 310–11.) wherever it is shown that stock has been killed on the track where it is the duty of the company to fence in the road, and the company has failed to fence in the manner required by law, a *prima facie* case is made for plaintiff. It is not requisite that the plaintiff should show further by affirmative evidence, that the stock were caused to go upon the road by the failure of the company to fence it. (Fickle vs. St. L. K. C. & N. R. R., 54 Mo. 219.)
2. *Railroads—Damage to stock—Enclosed and timbered lands—Fencing—Const. Stat.*—In suit for damage to stock under § 43 of the Railroad Act, (Wagn. Stat., 310–11;) where it appeared that at the point of the accident, the road adjoined enclosed and cultivated fields on one side, but rough timbered and unenclosed lands on the other, and that the stock got upon the road from the unenclosed side, company held liable. Under a proper construction the statute contemplates that the road shall in such case be fenced, not only on the side on which the field is situated, but on both sides.

Error to Cole Circuit Court.

Litton & Smith, and Ewing, for Plaintiff in Error.

I. The stock came on the road from an unenclosed and uncultivated, rough, rocky piece of woodland "commons" and not from an enclosed or cultivated field, or an unenclosed prairie," the only cases provided for by the statute. Hence defendant was not liable under the statute. (Wagn. Stat., 310, § 43; Cecil vs. Pac. R. R., 47 Mo., 246.)

E. L. King & Bro., for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace, under § 43, Art. II, of the statutes of this State, concerning corporations, (Wagn. Stat., 1872, p. 310,) to recover double damages for the killing of a horse by defendant, at a point on defendant's railroad where it passed along and adjoining enclosed and cultivated fields, and where the road was not fenced by a good or sufficient fence as required by law

The statement filed before the justice as a cause of action charged, that the defendant was an incorporated company under the laws of this State; that on the 31st day of May, 1871, at Liberty township, in Cole county, at a point on the track of the defendant's railroad where the same passed along and adjoining an enclosed and cultivated field, and not at a private or public crossing of said road, the defendant by its agents and servants, running its locomotive and train of cars, ran the same upon, and over a horse of plaintiff's of the value of $125, and thereby killed said horse; that the defendant had failed and neglected to erect or maintain good or sufficient fences on the sides of its road, at the point where said horse got upon the track of said road and was killed; and that by reason of said killing, and by virtue of the 43rd section of chapter 63, of the General Statutes of Missouri, judgment is prayed for double the value of the horse killed, etc.

The plaintiff recovered a judgment before the justice, from which the defendant appealed to the Cole Circuit Court, where the plaintiff again recovered a judgment for double the value of the horse, as found by the jury. The defendant then sued out his writ of error, and has brought the cause to this court.

At the trial in the Circuit Court, it was admitted by the defendant that it was a corporation as charged. The evidence on the part of the plaintiff tended to prove that the defendant was the owner of, and operated a railroad which runs through Liberty township, in Cole County; that on the 31st day of May, 1871, the agents and servants of the defendant who were in charge of a locomotive and train of cars, being used and run on said railroad in said township, ran the same against, and killed a horse belonging to the plaintiff; that at the point where said horse was killed, the said road passed along or adjoined inclosed and cultivated lands on one side thereof; that on the other side of the road, the land was rough, rugged and uninclosed timbered land; that the road had been fenced, but the fencing was in a dilapidated condition, and wholly insufficient, being in places only one foot high; that the horse of the plaintiff was seen on the

track of the road, opposite to the inclosed fields on one side of the road where the cars of defendant struck, ran over, and killed him, and that the horse was worth one hundred and twenty five dollars, and that there was no road crossing at or near where the horse was killed. There was no evidence to show at what particular point or place, the horse came on to the road. There was no evidence offered on the part of the defendant. At the close of the evidence the court at the instance of the plaintiff instructed the jury as follows: It is admitted that the defendant is a corporation, as stated. If therefore the jury believe from the evidence that the plaintiff was, on or about the 31st day of May, 1871, the owner of the horse mentioned in the complaint, and that the horse got on the road of defendant where the same runs through, along or adjoining an inclosed or cultivated field, and that the defendant did not then and there have erected a good and substantial fence on the sides of the railroad, of the height of at least five feet, or have then and there cattle guards at road crossings at such points where the said railroad passed said cultivated field or inclosure, sufficient to prevent horses, mules and cattle from crossing; that said horse was killed at the time aforesaid by the defendant's engine or train of cars, and that the same was done in Liberty township, in Cole county; then the jury will find for the plaintiff, and assess his damages at whatever sum they may believe he has sustained by reason of the killing, not to exceed the amount claimed." The defendant objected to said instruction, and his objection being overruled, it, at the time, excepted. The court then, at the request of the defendant, gave the jury the following instructions, to-wit:

First. The court instructs the jury, that the Pacific Railroad is not bound by law to erect and maintain fences along the line of its roadway, on the side or sides thereof, when the woods or commons abut against, or adjoin said railway; and if stock stray or get on said road from such woods or common, and go in any direction on said road, and are killed by the locomotives and cars of said railroad, the said railroad

is not liable therefor under the statutes, in this form of action.

Second. Unless the plaintiff prove to the satisfaction of the jury by affirmative proof, that the plaintiff's horse strayed on said railroad, at a point where it was bound by law to erect a lawful fence, and was killed by the locomotive and cars of defendant, the jury ought to find their verdict for the defendant.

Third. Although the jury may believe from the evidence, that the horse of plaintiff was killed on the track of said railroad, and at a point where on the south side of said railroad there was an enclosed field, and that the fence between said railroad and field was defective, and of less height than five feet; yet the plaintiff is not entitled to recover, if the jury shall believe further from the evidence, that said horse went on said railroad directly from the open woods and commons on the north side of said road, at any place whatever where such woods or common adjoins said roadway.

Fourth. Although the jury may believe from the evidence that the fences on the south side of said railroad, and on the north side thereof, where said road passed along, through, and adjoining an inclosed and cultivated field, was of a less height than five feet, and was defective, yet unless the plaintiff shows to the satisfaction of the jury that said horse got on said road by reason of such low and defective fences, and was killed on said road, the jury must find for defendant.

The jury found a verdict for the plaintiff for one hundred and twenty five dollars. The court, on motion of the plaintiff, then rendered a judgment in favor of the plaintiff for double the amount of the verdict.

In due time the defendant filed its motion for a new trial assigning all of the usual reasons for said motion. This motion being overruled, the defendant excepted. The defendant then filed its motion in arrest of judgment, in which it assigns as causes for said motion, that the verdict did not affirmatively show the 'statutory facts necessary to authorize the court to give judgment for double the amount thereof, and because

the verdict does not support the judgment, under the statute. This motion was also overruled by the court, and the defendant again excepted.

It is contended by the defendant that it is only liable, in this form of action, for stock killed by its locomotives and cars, which came upon its road from enclosed or cultivated fields or uninclosed prairie lands, and when said stock is caused to escape upon the road by the failure to erect fences at such place, and that therefore the instruction given to the jury by the court, at the request of the plaintiff, was improperly given.

It is also asserted, that there is no evidence in the case which tends to prove that the horse sued for escaped on the road of defendant from enclosed or prairie lands, and that therefore the court ought to have simply instructed the jury that there was no evidence in the case that would authorize them to find for the plaintiff, and that they should find a verdict for the defendant.

I do not think that this is a proper construction of the statute. The statute provides, (Wagn. Stat., 1872, 310, § 43;) that: "Every railroad corporation formed or to be formed in this State, and every corporation formed or to be formed under this chapter, shall erect and maintain good and substantial fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed prairie lands, of the height of at least five feet, with openings and gates, or bars therein, and farm crossings of the road, for the use of the proprietors or owners of the lands adjoining such railroad; and also to construct and maintain cattle guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses cattle, mules and other animals, from getting on the railroad. Until such fences, openings and gates or bars, farm crossings or cattle guards shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals, on said road, or by reason of any horses, cattle, mules or other animals, escaping

from, or coming upon said lands, fields or inclosures, occasioned in either case, by the failure to construct or maintain such fences or cattle guards."

It will be seen that this statute provides for the recovery of damages by parties injured in two classes of cases; first, where damage shall be done by the agents, engines or cars of the railroad company to horses, cattle, mules or other animals on the road; second, where such animals escape from, or come upon, said lands, fields or inclosures, and damages result therefrom, occasioned in either case by the failure to construct or maintain fences, etc. In the one case, the injury is done directly to the horses or other stock by the agents or cars of the company; in the other cases the injury arises from the escape of the stock from the enclosed fields, or from the coming of stock upon said fields and the doing of damage thereon. Wherever it is shown that stock is killed on the track of the railroad at a point where it is the duty of a railroad company to fence the road, and not at a road-crossing, and the company has failed to fence the road as required by law, a *prima facie* case is made for the plaintiff. It is not requisite that the plaintiff should further show by affirmative evidence, that the stock were caused to go on the road by the failure of the railroad company to fence the road.

If the plaintiff's horse is shown to have been killed at a point where the road is required to be fenced, and where it is not fenced, it will be presumed, in the absence of any evidence to the contrary, that the damages were occasioned by the failure of the railroad to fence its track. It is true, that in case of Cecil vs. Pacific R. R. Co., 47 Mo., 246, a different rule was adopted; but in the case of Fickle vs. St. L., K. C. & N. R. Co., decided at the October term of this court, (54 Mo., 219) and in other cases decided by this court at the same term, it was held that where stock were killed on a railroad at a point where the road was required to be fenced, but was not fenced, it would be presumed that the injury was caused by the failure to fence the road, in the absence of opposing evidence. With this view of the law, the instruction given

by the court on the part of the plaintiff was a proper exposition of the law.

It is further insisted by the defendant, that where the railroad of the defendant passed along or adjoining to inclosed or cultivated fields on one side of it, but on the other the adjoining lands were rough, timbered, uninclosed lands, and the stock killed or injured by the locomotive or cars entered upon the road from the uninclosed side, the company is not liable for the injury to the stock, under the statute.

The statute provides, that where the road passes through, along or adjoining inclosed or cultivated fields, etc., good and substantial fences shall be erected on the sides of the road.

This seems to contemplate, that the road shall be fenced not only on the side on which the field is situated, but on both sides. The same thing is required where the road runs through uninclosed prairie lands, and the contemplation of the law is, that the road shall be fenced on both sides so as to prevent the approach of stock to the road; and it can make no difference from which side the stock approach or come upon the road, the corporation is required to fence the road, and if it fails to do so, it is liable for the damages done to stock on the road, no matter from which side the stock approaches.

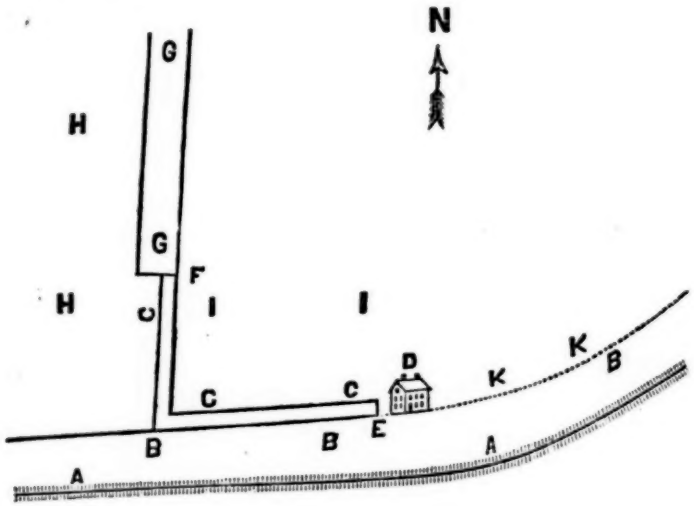
It follows, that the third instruction given by the court on the part of the defendant was improperly given, but as this instruction was unfavorable to the plaintiff and he does not complain, the judgment will not be reversed for the error of the court in giving said instruction. We also think, that the second instruction given on the part of the defendant was more favorable to it than the law would justify. Yet, as the plaintiff recovered notwithstanding these instructions, the defendant cannot complain, as the evidence is deemed sufficient to support the verdict.

The other judges concurring, the judgment of the Circuit Court is affirmed.

H. N. Ells, Respondent, *vs.* Pacific Railroad, Appellant.

1. *Practice, civil—Pleading—Replication—Negative pregnant.*—In suit for damages against a railroad company for killing stock, the answer of the road set up a contract on the part of plaintiff to erect a fence along the road, charging that by reason of his failure to fence, the stock got upon the road. Plaintiff, in his replication, denied that he was bound by any contract with the company to build a fence on his own land on the line of the said road, as stated by defendant, and denied, "that plaintiff's stock came on said road by reason of plaintiff not building a fence that he was bound to build by reason of any contract that he had made." *Held*, that under our liberal practice, such a denial being collaterally set up in the pleadings, was sufficient to require defendant to produce the contract on the trial, so that its terms could be construed by the court.
2. *Damages—Railroads—Stock getting on track by trespass on adjoining lands.*—*Semble*, that when stock of a third party trespass upon the land of a proprietor, adjoining a railroad, and go from thence upon the road and are killed, the company will not be liable for damages.

The following diagram represents the localities described by the court.



A R. R. track.
B R. R. lands.
C Private alley.
D Sandrock's house.
E Bars.
F Gate.
G Public street.
H Ells' lands.
I Sandrock's lands.
K Unenclosed lands

Appeal from Cooper Circuit Court.

Hayden & Tompkins, for Respondent.

J. N. Litton, for Appellant.

I. Strangers and trespassers on lands have inferior rights to land owners when their stock are killed. (Mayberry vs. Concord R. R., 47 N. H., 391; Cornwall vs. Sullivan R. R. Co., 8 Foster, 161; Ham vs. A. & St. Lawrence R. R., 35 N. H., 163; Chapin vs. Sullivan R. R. Co., 39 N. H., 53 and 564; Woolson vs. Northern R. R., 19 N. H., 267; Jackson vs. Rutland R. R. Co., 25 Vt., 150; Morse vs. Rutland R. R. Co., 27 Vt., 49; Picketts vs. East Ind. Docks R. R. Co., 12 C. B., 160; Eames vs. Salem R. R. Co., 98 Mass., 560; Perkins vs. Eastern R. R. Co., 29 Maine., 307; Hurd vs. R. & B. R. R., 25 Vt., 116; Brooks vs. N. Y. & Erie R. R., 13 Barb., 596; Talmadge vs. R. & S. R. R. Co., 13 Barb., 493; 33 Cal., 230; Aylesworth vs. Hennington, 17 Mich., 417.)

II. Meeting an allegation of fact by a statement of a conclusion of law, admits the fact alleged. (See Soeding vs. Bartlett, 35 Mo., 90.)

Vories, Judge, delivered the opinion of the court.

This action was brought by the plaintiff in the year 1870, to recover damages from the defendant, under the 5th section of the statute of this State, concerning "damages and contributions in actions of tort" (Wagn. Stat., 520), for killing horses and mules of the plaintiff on the railroad of the defendant, on a portion of the said railroad, where the same was not fenced and where there was no crossing of a public highway.

The defendant, by its answer, after denying the material allegations of the petition, sets up the following new matter as a defense to the action: That on the 10th day of February, 1868, the Osage Valley and Southern Kansas Railroad Company leased to defendant that portion of their road extending from Tipton, in Moniteau county, to Boonville, Cooper county, all in the State of Missouri, with all the rights, privileges

and appurtenances to said Osage Valley and Southern Kansas Railroad Company belonging or in anywise appertaining. Defendant further says, that the Osage Valley and Southern Kansas Railroad Company, by their Chief Engineer, P. M. Gustravus, entered into an agreement with the plaintiff herein, whereby the said plaintiff, for a valuable consideration in said contract mentioned, agreed to build 1,500 feet of picket fencing on his land and along the line of said railroad in said county of Cooper aforesaid, said fencing to be a good and lawful fence. And said railroad company by their chief engineer, agreed to pay and did pay plaintiff the sum of three hundred and sixty-four dollars, with which to build said fence; but plaintiff wholly disregarding his obligations and duties under said agreement, failed and refused and neglected to build said fence as he had agreed to do.

"Defendant further says, that by reason of said failure and neglect on the part of said plaintiff to build said fence as he had agreed to do, said railroad track adjoining said land that he had agreed to fence, and whereon said stock was roaming, and from which it escaped upon the railroad track, remained unfenced by plaintiff, and in the condition it was at said time. And said stock came upon the track by reason of plaintiff's failure to build the fence at a point where he contracted to fence. And for further answer, defendant says, that, notwithstanding plaintiff had contracted and failed to build said fence, said Osage Valley and Southern Kansas Railroad did, at its own expense, build a good and lawful fence along said road, where said stock came upon said road, and that the same was a private farm crossing. The answer of the defendant then proceeds to state the following matter by way of further defense: "This space said Osage Valley and Southern Kansas Railroad desired to fence up with a permanent and immovable fence and was engaged in doing so when the owner of said land demanded, that instead of a fence, the said railroad should fill a space of seven or eight feet with bars that he could remove, so as to enable said owner to pass across said railroad to his land on the other side of said rail-

road, and said Osage Valley and Southern Kansas Railroad did put in said fence a private farm crossing, and closed the same with good and sufficient bars, sufficient to turn stock, but shortly before the accident, the owner of said land did remove said bars, and erected at the other end of the private lane that terminated at said private farm crossing on the railroad, a good and sufficient gate, and when said gate was closed, stock could not get upon said railroad, and said railroad was closed with a lawful and sufficient fence, but on the morning of the accident, plaintiff's stock roaming upon the public streets in the City of Boonville, escaped therefrom through said gate, which had accidentally been left open by strangers, upon the private enclosed premises of one Sandrock, the owner of said land, and running through said premises, down said private lane, escaped through the place from which said owner, Sandrock, had removed said bars, on to the railroad track. Said stock were trespassers, and said plaintiff was guilty of gross negligence, in not removing said stock from said track, after he knew they were there and the train was coming. Wherefore," &c.

The plaintiff filed his motion to strike out all of this latter defense, set forth in this last part of said answer, because the facts therein stated constituted no defense to the action and were frivolous and irrelevant. This motion was sustained by the court and defendant excepted. The plaintiff then filed a replication to the remaining affirmative part of the answer, in which he states that: "He denies he was bound by any contract with the Osage Valley and Southern Kansas Railroad, to build a fence on his own land and on the line of said railroad track, as stated by defendant in his said answer, and denies that plaintiff's stock came on said railroad track by reason of plaintiff not building a fence that he was bound to build by reason of any contract that he had made."

The plaintiff then denies that defendant had built a good and lawful fence on said road, and states, that at the time said stock came on said road there was no lawful fence on said road, and prays judgment, &c.

The defendant moved the court for judgment on the repli-

cation, because the allegations setting forth a contract to fence the land, in the answer, are not denied specifically in the manner required by law. This motion was overruled by the court and the defendant excepted.

The case was tried by a jury. The plaintiff introduced evidence tending to prove that the mules and horses were killed and injured on the 7th day of July, 1869, within the limits of the City of Boonville, but at a portion thereof not laid out into streets or town lots; that there was a fence on the east side of the railroad track; that there was a street or passage-way on the north or north-west side of the roads which had been opened by the owners of the land for their use and convenience, and which extended from a north direction southward, and ran between the land of plaintiffs and one Sandrock, and approached the railroad in a southward direction to within some fifty yards of the road; that plaintiff lived on the west side of this private street and some distance north of the railroad, and that Sandrock resided on the east side of this private way, and his house was near the railroad and only a short distance east of this street, but as the street did not extend south to the railroad lands, Sandrock had no convenient outlet from his house to the street. He, therefore, opened and fenced an alley from the south end of said street to the railroad land, continuing with the east line of said street to the railroad land, along which the railroad was constructed. After this alley reached the railroad lands it turned directly east, forming an angle and extending along the north edge of the railroad to his house, a distance of about fifty yards. This alley was fenced on the east and north sides by Sandrock and on the west by the plaintiff and on that part of the alley running east, it was fenced by the railroad on the south side next the road. The east end of the alley, near Sandrock's house was closed by bars being erected across the same. These bars had afterwards been removed and a gate erected by Sandrock at the north end of the alley, where it intersected the end of the street in the direction of plaintiff's house. The gate at the north end of the alley had been left opened by some one,

and plaintiff's stock entered the same from the said street and followed along said alley to the east end thereof, where it opened out on the open land adjoining the railroad near Sandrock's house, and from thence passed on to the railroad and were killed and injured. It was also proved, that plaintiff also owned the land where Sandrock resides, where the road was located, and subsequently sold the same to Sandrock,and this street spoken of was left between the land sold and that retained for the convenience of the proprietors. The plaintiff also read in evidence the contract referred to in defendant's answer, by which it was averred in the answer, that plaintiff agreed to fence the railroad. By this contract or agreement, the plaintiff agrees with the Osage Valley and Southern Kansas Railroad Company to build fifteen hundred feet of fencing on his land in accordance with an agreement entered into on the ——, whereby said H. N. Ells, relinquished to said Osage Valley and Southern Kansas Railroad Company the right of way for said road through his land, the fencing to be a picket fence, &c.

The agreement further points out the manner that the fence shall be paid for, its description, &c. The plaintiff then read in evidence the agreement referred to in the agreement already read, the points of which tend to explain the other contract are as follows: That in consideration that the said railroad company shall locate the route of the said railroad through the land belonging to said H. N. Ells, lying and being within the limits of the City of Boonvile, lying in the county of Cooper in the State of Missouri, the said H. N. Ells does hereby covenant and agree with the said railroad company, that upon the permanent location of the route of said railroad through the said land, he will relinquish to said railroad company the right of way forsaid road through said land, as the same may be hereafter surveyed * * * * *. It is also further agreed between the parties aforesaid, that the said railroad company shall furnish the said H. N. Ells with a crossing, placed where most convenient, and shall furnish, put up, and maintain a picket fence, seven feet high, with a base board from six inches to one

foot wide, the width between the strips or pickets not to exceed two and a half inches, and to build said fence on the said land when directed by the said H. N. Ells for a length of fifteen hundred feet. "In testimony, &c." The plaintiff also produced evidence tending to prove, that the fence named in the contract was erected around his vineyard on his land and paid for by the railroad company.

The defendant gave evidence tending to prove that part of the stock was not injured by the locomotive on the train; that it would have taken about 1,200 feet of fencing to fence the road on both sides on plaintiff's land, and that plaintiff's horses could not have gotten on the road if the bars had not been taken away from where they were first erected.

The court, at the close of the evidence, instructed the jury as follows:

"The jury are instructed, that plaintiff was not bound to keep his stock in an inclosure, and if while they were not confined they wandered on the railroad and were killed or injured by defendant's locomotive at a point where there was no sufficient fence and no crossing of a public highway, or at a point not within the corporate limits of the City of Boonville, which had not been by the corporate authorities laid out into lots, streets, alleys or squares, then the jury will find for the plaintiff."

"The jury is instructed that there is no evidence in this case that the plaintiff was, by contract with defendant, bound to build on his land or the land of the defendant, a fence along the line or parallell with the line of the Osage Valley and Southern Kansas Railroad, in the place of the fence which the defendant was bound by law to build on both sides of said road, where said road passed through or along and adjoining enclosed or cultivated fields, and no public highway crossed." There were several other instructions given on the part of plaintiff and several given on the part of the defendant, which it is not necessary to set forth here. The court also refused several instructions asked for by the defendant, none of which, however, except one, is it necessary to set forth here in order to an understanding of the points growing

out of the record in this case. The instruction, on the refusal of which the defendant mainly seems to rely for a reversal of this case is as follows: No. 1. If the jury believe from the evidence, that the plaintiff agreed and contracted with the Osage Valley and Southern Kansas Railroad Company to build a fence along the line of said railroad and on the plaintiff's land, and failed and neglected to build said fence, and by reason of such neglect and failure on the part of the plaintiff, the stock described in the petition as belonging to plaintiff came upon the track of said road at a point where plaintff had agreed to fence, and was killed or injured by the engines and cars of defendant running on said road, they will find for defendant."

The jury found a verdict for the plaintiff. The defendant, in due time, filed its motion for a new trial which was overruled by the court, and the defendant appealed to this court. The defendant has saved several exceptions to the rulings of the court below, but it will not be requisite that we should examine more than a few of these in order to a proper determination of the case. The first objection urged by the defendant is, that the court erred in striking out part of his amended answer. The greater portion of the part of said answer stricken out seems to be so confusedly stated, that it would be difficult to see how the plaintiff could be connected with the matter stated, but at the conclusion of said part of the answer it is stated that said stock were trespassers, and said plaintiff was guilty of gross negligence in not removing said stock from said track, after he knew they were there and that the train was coming."

It does not appear how the matter thus stated had any connection with the previous part of the answer, and if it is intended to be a substantive and independent and affirmative answer it is not so stated and certainly has the merit of brevity. How the stock were trespassers and what that fact had to do with the plaintiff's neglect to remove the stock from the track, does not appear. No facts are stated sufficient to constitute a defense, and the court properly struck that part of the answer out.

It is not doubted that the defendant may show that the stock sued for were killed by the fault of the plaintiff, but when such defense is attempted by answer, the facts must be set up constituting the defense.

The next objection urged by the defendant is, that the court refused to render judgment in favor of the defendant upon the replication filed to defendant's answer. The answer averred, that plaintiff had contracted to erect the fence along the railroad and had failed to do so, and that it was in consequence of his failure to erect the fence that the stock went upon the road. The replication to this part of the answer is as follows: "He denies that he was bound by any contract with the Osage Valley and Southern Kansas Railroad Company to build a fence on his own land on the line of said railroad track, as stated by defendant in his answer, and denies that plaintiff's stock came on said railroad track by reason of plaintiff not building a fence that he was bound to build by reason of any contract that he had made."

It is insisted that this replication only denies a conclusion of law and is not a specific denial of the facts stated in the answer. It is true that the replication might be construed to be a negative pregnant, and while it denied the execution of a contract which bound him to fence the road, it impliedly admitted that some kind of contract had been made. I think, under our liberal practice, where a contract is collaterally set up in pleadings, a denial of this kind is sufficient to require the defendant to produce it on the trial, so that its terms can be construed by the court. It may be said, that some contract was admitted to have been made to build a fence, but not a contract to fence the road.

It is next objected that the court improperly instructed the jury that there was no evidence tending to prove that the plaintiff had contracted to fence the road, and improperly refused the instruction asked for on the subject of the contract by the defendant. The court committed no error in giving the one or refusing the other of these instructions. There is no question but that the instruction asked by the defend-

ant is abstract law; that was decided by this court, when this case was formerly before it. But the contracts are now offered in evidence and they have not the slighest tendency to show that plaintiff undertook to fence the railroad. It was upon this express ground, that the one instruction was given and the other refused by the court. And the question as to the sufficiency of the evidence was neither made or decided when the case was here before. The contracts when read together (and they both only constituted one so far as the building of the fence is concerned,) only show that in consideration that plaintiff had relinquished the right of way, the railroad company agreed to build him 1500 feet of fencing, and that afterwards they employed plaintiff to put up the fence and agreed to pay him for it. The fence was to be erected for the plaintiff on his land and not for the company, and there was nothing which tended to prove that plaintiff undertook to fence the road.

It is further insisted by the defendant that where a farm crossing is left for the accommodation of an adjoining proprietor on the side of a railroad, and a gate or bars are put in the fence which incloses the road for the convenience of the proprietor, and the proprietor himself destroys the fence, or leaves open the bars, by reason of which his stock is killed, neither the proprietor nor his tenants, nor those claiming under him can recover of the railroad where stock escape on the road from that cause; and an instruction is asked and refused by the court to that effect, and also to the effect that if stock of another should trespass in the fields of such proprietor, and go from thence on to the railroad, and be injured, the company would not be liable. A great number of authorities are cited to sustain these views. There is no question but that the defendant is mainly right in these positions, but there is not a particle of evidence in the record to show that there was any crossing where the stock got on the road, nor that the horses were trespassing on any body's land, or that they were wrongfully on the land of Sandrock. Sandrock had a private wagon alley from the open street to

his house, this alley was open, it was not unlawful for plaintiff's horses to be running at large. They passed through this open alley, to the open ground along the railroad, without trespassing on any one, and went on to the road and were injured. The law insisted on is therefore not applicable to this case. The road was fenced on the side of this alley next the road up to Sandrock's house. If this fence had been extended east along the road, the accident could not have occurred. There were several other points made and argued in the brief of defendant in this case, but with the view we take of it, they are not applicable to the pleadings or facts in the case, and will not here be further noticed. Judge Wagner and Sherwood absent.

The other judges concurring, the judgment is affirmed.

THE STATE OF MISSOURI, Respondent, *vs.* M. M. WELTON, Appellant.

1. *Licenses—Peddlers—Constitutionality of.*—The law touching peddlers' licenses, (Wagn. Stat., p. 979, §127,) is not in conflict with the Constitution of the United States, as discriminating in favor of manufactures of this State, and against those of other States. The law simply creates a tax upon a calling, and not one in any manner upon property. The amount of the tax is not regulated by the value of the article sold.

The peddlers' license law does not attempt to regulate inter-state commerce.

Appeal from Henry Circuit Court.

S. M. Smith, for Appellant.

I. A State law discriminating in favor of its own productions, and against those of other States, whether the discrimination is called privilege, license, or any other name, is in conflict with the provisions of §§ 8, 10, Art. I, of the Constitution of the United States, and void. (State vs. Scott & North, 27 Mo., 464; Crow vs. State, 14 Mo., 237; Brown vs. Maryland, 12 Wheaton, 419; Alney vs. California, 24 Howard, 169; Crandell vs. Nevada, 6 Wall., 35; Wood-

ruff vs. Parkham, 8 Wallace, 12; Hinson vs. Lott, 8 Wall. 148; Ward vs. Maryland, 12 Wall. 418.)

II. Hence the law is void.

H. Clay Ewing, for Respondent.

I. The indictment is sufficient, and the appellant was properly convicted under the evidence and law. Sec. I, of Act concerning peddlers, (Wagn. Stat., 979,) is not in conflict with §§ 8, 10, Art. I, of the United States Constitution. The law does not attempt to tax property: Its object is, to require peddlers to pay license, which the legislature had a right to do. (State vs. Austin, 10 Mo., 593; State vs. Simmons, 12 Mo., 268; Nathan vs. Louisiana, 8 How., 73.)

II. There is no attempt or design to "lay imposts or duties on imports, nor to regulate commerce between the States." See dissenting opinion of Judge Napton, in Crow vs. State 14 Mo., 319; State vs. North & Scott, 27 Mo., 483, and cases there cited.

Napton, Judge, delivered the opinion of the court.

The defendant was indicted for selling goods without a license, and found guilty, but claimed that the Act requiring him to take out a license was unconstitutional, because it discriminated in favor of articles the growth and produce of this State. The act in question in its first section declares that "whoever shall deal in the selling of patent or other medicines, goods, wares and merchandise, except books, charts, maps and stationery, which are not the growth, produce or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler." And no one is allowed to deal as a peddler without a license. The 7th section of the law provides, that the tax to be paid for such licenses shall be regulated as follows: First. If the peddler travels and carries his goods, on foot, he is to pay three dollars for a six months' license; if he uses one or more horses or other beasts of burthen, he is required to pay ten dollars for every

six months; if a cart or other land-carraige is used to convey the goods, he pays twenty dollars for every period of six months; and if the goods are conveyed on a boat or other river-vessel, he pays at the rate of one dollar per day, etc.

It is now claimed that the tax on these licenses is a discriminating tax, exempting the home-made articles, and under the guise of a license, taxing the goods which are the growth, manufacture or produce of other States, and the decisions of this court in Crow vs. State, 14 Mo., 237, and State vs. North & Scott, 27 Mo., 464, are invoked to sustain this position.

But we are unable to see the applicability of these cases to the Act concerning peddlers. If these cases were applicable, I should certainly adhere to the opinion which I gave in those cases, because the opinions there expressed are in conformity with my present views and in accordance with the views of my present associates; but it is unnecessary so to decide.

The merchants' licenses discussed in those cases, were, as they now are, mere modes of taxation upon property, and the validity of such taxation necessarily arose. The law now in question is, manifestly, simply a tax on a calling, and the amount of the tax is not affected by the value of the property authorized to be sold under it. This calling or profession is limited to the sale of merchandise, which is not the growth or manufacture of this State, and is thus defined in the Act.

The cost of the licenses is not affected at all by the value of the goods peddled, but by the mode in which the business is conducted. The peddlers, who travel on foot, are not required to pay as much for a license, as those who use horses or mules, or conveyances by land or water. There is no tax, direct or indirect, on property of any kind. The foot-peddler gets a license for a smaller sum than the wagon or steamboat peddler—although the foot peddler may have in his pack, the most costly goods, such as jewelry or lace. The law disregards the value of the goods in fixing the amount of the license.

The decisions of this court, in the cases referred to, have no bearing on this case. The case of Ward vs. Maryland, 12

Wallace, 418, decided by the Supreme Court of the United States, is also totally foreign to this case, but the intimations of Judge Clifford, who delivered the opinion in that case, sustain my positions in the cases of Crow vs. State, and State vs. North & Scott.

That case turned upon a construction of a clause in the Constitution of the United States, which provided that, "the citizens of each State should be entitled to all the privileges and immunities of citizens of other States." The law in question discriminated between citizens of Maryland and citizens of other States pursuing the same calling in Maryland, and levied a higher tax upon the non-resident peddler. But there is no such feature in our law. Whether the peddler comes from Maine or Louisiana, or has been born and lived here all his life, makes no difference in the tax he pays for a peddler's license.

The case of Crandell vs. The State of Nevada, 6 Wall., and the cases of Woodruff vs. Parkam and Hinson vs. Lott, 8 Wall. have no bearing on the points of this case. It cannot be pretended, that the statute concerning peddlers' licenses is any attempt to regulate inter-state commerce. It applies solely to the internal commerce of this State. No discrimination is made against the peddler because he comes from other States. It is merely enacted, that a peddler is one who deals in articles manufactured elsewhere than in Missouri, and he is required to take out a license. Nothing is said or enacted concerning persons who do not deal in such articles of merchandize. There are other laws which tax all the property of citizens of the State. This law is no taxation on property at all, either directly or indirectly. It is simply a tax on a calling or profession, and as such its validity cannot be questioned. (Nathan vs. Louisiana, 8 Howard, 73.)

The judgment is affirmed; all the judges concur.

WILLIAM BEERS, Respondent, *vs.* ATLANTIC & PACIFIC RAILROAD COMPANY, Appellant.

1. *Justice of peace—Default—Motion to set aside—Appeal, etc.*—It is immaterial upon what ground a motion to set aside a default before a justice of the peace is made, or overruled. The only pre-requisite to the appeal, is the filing and overruling of the motion.
2. *Justice court—Appeal—Motion to dismiss—Affirmance of judgment.*—The Circuit Court has no power, after sustaining a motion to dismiss an appeal from a justice of the peace, to affirm the judgment of the justice. But such error may be corrected in the Supreme Court without sending the case back.

Appeal from Crawford Circuit Court.

J. N. Litton. for Respondent.

Lay & Belch, and N. G. Clark, for Appellant.

ADAMS, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace, against the defendant, on the statute for double damages, for killing an ox belonging to plaintiff. The defendant was duly summoned but failed to appear, and the justice rendered a judgment by default against the defendant. In due time the defendant appeared before the justice and filed a motion to set aside the default, which motion was overruled and the defendant appealed to the Circuit Court. In the Circuit Court the plaintiff filed a motion to dismiss the appeal upon the ground that the defendant had not paid or offered to pay the costs of the suit when the motion to set aside the default was made and acted on. On the trial of this motion in the Circuit Court, the plaintiff introduced the affidavit of the justice, who swore that the costs were not paid or tendered when the motion was overruled by him. The court thereupon sustained the motion, but did not dismiss the appeal, but rendered judgment affirming the judgment of the justice. And to this action of the court, the defendant duly excepted and has brought the case here by appeal.

Where a justice renders a judgment by default, a motion to set the same aside must be filed and overruled before an appeal can be allowed. (Wagn. Stat., 832, § 17.)

The justice may overrule it when he is satisfied that no good cause is shown. Or he may overrule it because the party does not pay or offer to pay the costs. But whether it be overruled for one reason or the other, or for no reason at all is wholly immaterial. The action of the justice in overruling it is the only necessary pre-requisite to an appeal. (Wagn. Stat., 847, § 2.) Upon the filing of the papers by the justice in the clerk's office, the Circuit Court becomes possesssed of the cause and is required to proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice. (Wagn. Stat., 849, § 13.) There seem to be no defects in the proceedings of the justice; but, if there had been, this section would cure it.

After sustaining the motion to dismiss the appeal, the court had no power to affirm the judgment. But the court might have corrected that error here without sending the case back.

The court however erred in sustaining the motion to dismiss the appeal, and for this error the case must be remanded. There seems to be no other error in the record.

Judgment reversed and cause remanded. The other judges concur.

E. CAULK, Respondent, *vs.* J. C. BLYTH, *et al.*, Appellants.

1. *Equity—Reference not allowed unless by consent, when.*—In proceedings in chancery to correct a mistake in the description of land in a conveyance, the court, under the statute, (Wagn. Stat., 1040, § 12; 1041, §§ 13, 17,) has no authority to award issues and refer them to be tried by referees, without the written consent of the parties. Such case does not come within the provisions of § 18 p. 1041, Wagn. Stat.

Appeal from McDonald County Court.

H. C. Young, for Appellants.

Randolph & Thrasher, for Respondent.

Adams, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery to correct a mistake in the description of land in a conveyance. When the case was called for trial, the court on its own motion appointed referees to try the issues, and ordered them to report at the next term of the court. At the next term the referees filed their report, and the evidence upon which it was founded. The defendants objected to the report and moved the court to reject it, because the court had no right on its own motion to make the reference. The court overruled this motion and without hearing any evidence pronounced a decree in favor of the plaintiff, on the report of the referees, according to the prayer of the petition. From an inspection of the evidence as reported by the referees, I have no doubt the justice of this case is on the side of the plaintiff. But the court had no authority on its own motion to refer it. The whole subject of reference is governed by the statute. In actions for the recovery of money only, or of specific, real or personal property, an issue of fact must be tried by a jury, unless a jury trial be waived or a reference ordered as provided by the statute. (Wagn. Stat., 1040, § 12.) Every other issue must be tried by the court, which however, may take the opinion of a jury upon any specific question of fact involved, or may refer it as directed by the statute. (Wagn. Stat., 1041, § 13.) The statute provides that "all or any of the issues of fact in the action may be referred upon the written consent of the parties." (Wagn. Stat., 1041, § 17.) "Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: First, when the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or, second, where the taking

of an account shall be necessary, for the information of the court, before judgment, or for carrying a judgment or order into effect; or third, where a question of fact other than upon the pleadings, shall arise upon motion or otherwise in any stage of the action." (Wagn. Stat., 1041, § 18.) These are all the provisions of the statute allowing references to be made. It is obvious from these quotations that the court had no right to award issues in this case and refer them to be tried by referees without the written consent of the parties. There was nothing in the case that brought it within the provisions of the 18th section above quoted.

For these reasons the judgment must be reversed, and the cause remanded. Judges Vories and Napton concur. Judges Sherwood and Wagner absent.

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Opinion of Supreme Court Judges on Township Organization Law.

1. *Counties, political sub-divisions of the State.*—Counties are sub-divisions of the State for governmental purposes, and the General Assembly may create, alter, abolish and regulate them as expediency may demand, so that no vested rights are interfered with.

Per Curiam.

2. *Township Organization Law constitutional—Does not delegate legislation.*—The Township Organization Law is not unconstitutional. It is a general law, which takes effect from and after its passage. If the majority of the voters in a county vote for it, the vote does not create the law, but places the county so voting within its provisions. The law does not delegate legislative authority to the counties. (See State *ex rel.* vs. Wilcox, 45 Mo., 458 and authorities cited.)

Per Vories, J., Dissenting.

3. *Township law unconstitutional—Delegation of power to counties.*—The Township Organization Law is unconstitutional, for it attempts to delegate the legislative power to the different counties of the State. It derives vitality from the action of the several counties, and without such action would remain a dead letter. It has force from its passage merely for the purpose of transferring the power, to adopt the act, from the legislature to the counties. (State vs. Field, 17 Mo., 529.)

HOUSE OF REPRESENTATIVES, JEFFERSON CITY, Jan. 31st, 1873.

The subjoined opinion of the Supreme Court was rendered in answer to the following resolution of the House of Representatives of the 27th General Assembly:

Whereas, grave doubts have arisen throughout this State, as to the constitutionality of the present Township Organization Law, and whereas, the opinion of the Supreme Court of this State upon the matter is desired by the House, with a view to further and effective legislation: therefore, be it resolved, that this House do now respectfully request the Supreme Court of this State to give their opinion to this House as to whether said law be constitutional or not. Which was read and adopted. J. T. PRATT, Chief Clerk.

AT CHAMBERS, JEFFERSON CITY, MO., Feb'y 3rd, 1873.

If the annexed resolution is to receive a literal interpretation, it appears to be a call on the Supreme Court for its opinion as to the constitutionality of the present Township Organization Law. This court has no authority under the Constitution to give opinions on abstract questions of law. Its office is to hear and determine real controversies in all cases properly brought before it. It was not the intention of section 11 of article 6 of the Constitution to allow the Supreme Court to give its opinion on questions of constitutional law referred to in that section. The judges, and not the court, are required by that section, on solemn occasions, when called on for that purpose, to give their opinion on questions of constitutional law. But assuming that the intention of the resolution was, that the judges should give their opinion as law officers *pro hac vice*, we will proceed briefly to state our views as to the constitutionality of this law.

Counties are sub-divisions of the State for governmental purposes, and there can be no doubt about the constitutional power of the General Assembly to create, alter, abolish and regulate them as expediency may demand, so that no vested rights are interfered with. This Township Organization Law contains no provisions, so far as we are able to see, prohibited

by the Constitution. It is a general law made for the whole State, and by the terms of the act itself took effect from and, after its passage. Every county in the State may avail itself of the privileges offered by this law by a majority vote of its people. It is left to the option of the counties, whether they will organize under the law or not. If a majority vote for it, such vote does not create the law, but places the county so voting within its provisions, and the organization then takes effect, and also the law, as it existed before the vote was taken. The law does not delegate, nor was it the intention of the law makers to delegate legislative authority to the counties. Unless the counties avail themselves of the right to organize they will remain as they were, unaffected by any of the provisions of this statute. It is unnecessary to elaborate this point or to write a lengthy political essay on a subject, which, it seems to us, needs no illustration. It is sufficient to say, that we are satisfied that no provision of the Constitution has been violated in the passage of this law; and, without further discussion, we refer the Hon. House of Representatives to the case of the State *ex rel.* Joseph Dome, *et al.* vs. Orville Wilcox, 45 Mo., 458, and the authorities there cited, where a similar law came under review, and was held by the Supreme Court to be constitutional.

WASH ADAMS,
DAVID WAGNER,
T. A. SHERWOOD.

I concur in the conclusion arrived at in the foregoing opinion.

E. B. EWING.

[This case should, chronologically, have appeared in Vol. 51. Rep.]

AT CHAMBERS, Feb'y 4th, 1873.

To the House of Representatives of the General Assembly of the State of Missouri:

I suppose that it is intended by the annexed resolution to ask my opinion as a judge, of the Supreme Court of the State (under section 11 of article 6 of the Constitution of this State), as to whether the law known as the "Township Organization Law" be constitutional or not. I have not been able to give the subject as much investigation as its importance deserves,

yet I have given it all the investigation that my health and the time at my command would, under the circumstances, permit. From the investigation made, my mind has been forced to the conclusion, that the law referred to is in violation of the Constitution of this State. By the first section of the fourth article of the Constitution of this State it is provided, that: "The legislative power shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives. The Constitution then provides for the manner of organizing the General Assembly, the qualification of its members, and the mode and manner by which laws shall be adopted, &c.

It is admitted, I think, by all, that this power to legislate and enact laws cannot be delegated by the General Assembly to any other body; or, in other words, that there can be no statute or law passed without the will of the General Assembly of the State, expressed in the required form. I think that the law under consideration, attempts to delegate legislative power to the different counties of the State, and that the law has no vitality as a rule of civil conduct for the people, nor as the express written will of the General Assembly; but that it remains dormant until vitalized by the action of the different counties.

After the act has provided for the manner in which the vote of the different counties may be taken "for Township Organization or against Township Organization," the fourth section reads as follows: "If it shall appear by the returns of said election, that a majority of the legal voters of the county voting at said election are for Township organization, then the county so voting in favor of its adoption, *shall be governed by, and subject to, the provisions of this act* on and after the first Tuesday of April next succeeding." (The italics in this section are mine, as they are not italicized in the act.)

The last section in the act is as follows: "This act shall apply to and be in force in all counties adopting the act to provide for Township Organization, and take effect from and after its passage." The question now is, in view of these two sec

tions, from whence does this act receive its vital force? Not from the Legislature, for it will be seen that it would remain as dormant as the parchment upon which it is written for all time, unless some county should adopt it and give it vitality, and then it would only have force in the county that adopts it. But it is said, that the act is, by virtue of this last section, in force from its passage, and that it only remains for the counties to organize under the act as passed by the Legislature. In my opinion, this cannot be true; no county can organize under this act until it shall have first adopted it. The last section specifically states, that the act shall apply to, and be in force, in all counties adopting the act, &c., and, as before stated, if no county should ever adopt it, it would remain a dead letter for all time to come. I admit that the act is in force from its passage for one purpose, and one purpose only. That purpose is to transfer the power, to adopt the act, from the General Assembly to the various counties in the State. This, in my opinion, is to delegate to the counties legislative power, and the act is therefore in violation of the Constitution. To illustrate this matter, suppose that in some county, where this law shall have been adopted, some one violated some of the provisions of the law. How could such an one be convicted without first producing in court the records of the County Court, not merely to prove that the county was organized under the township act, but the first step would be to prove that the county had adopted the law. You would not go to the legislative records, or the statute passed by the General Assembly, to find whether there was such a law in force as the party was accused of violating, but you could only ascertain this fact from the records of the county. Then, I would ask, which puts this law in force, the will of the General Assembly, or that of the particular county? I think I am fully sustained in the view I have taken of this case by the arguments, as well as the facts, in the case of The State vs. Field, 17 Mo., 529, as well as by other cases to which I might refer. I know that, in the case of the State on the relation of Dome, *et al.* vs. Wilcox, 45 Mo., 458, a different conclusion seems to have

been arrived at. But I am asked for my opinion in reference to the law under consideration, and I could do nothing but give the conviction of my own mind, which I have done. I did not commence to make an argument, but simply to answer the questions propounded. I will, therefore, conclude by expressing my sincere regret at not being able to agree with my brother judges (for whose opinions I have the very highest respect) in reference to the question submitted.

Very Respectfully,

H. M. Vories,

One of the Judges of the Supreme Court.

John W. West, Plaintiff in Error, *vs.* Whitley F. Fowler, Defendant in Error.

1. *Practice, civil—Bill of Exceptions—Filing of in vacation without consent—Effect of.*—A bill of exceptions in order to become part of the record must be signed and filed during the term at which judgment is rendered; except that by consent of parties, also made matter of record, it may be signed and filed at a subsequent period.

Error to Miller Circuit Court.

Edwards & Son, and Lay & Belch, for Plaintiff in Error.

Ewing & Smith, for Defendant in Error.

Sherwood, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in chancery, and upon a final hearing the temporary injunction therein granted was dissolved and the petition dismissed. The last entry of record is as follows:

"John W. West, Plaintiff,
vs.
W. F. Fowler, Defendant.

And now comes the plaintiff, by his attorney, and asks and

obtains leave of court to file his bill of exceptions in the cause on or before the first day of December 1871."

Afterwards, in vacation, on the 12th day of December, 1871, an entry is made by the clerk showing that the bill of exceptions, duly signed and sealed by the judge, was filed by the plaintiff on that day, and that said bill bore an endorsement in these words: "It is agreed that this bill of——may be filed on or before the 15th day of December, 1871.

J. L. Smith, for Defendant."

Under such circumstances, it is impossible for us to examine the merits of this case, as there is, in legal contemplation, no bill of exceptions here. In strictness, the bill of exceptions can only become a part of the record by being filed in term. A relaxation of the rigidity of this rule, however, has so far taken place, that by consent of the parties, made matter of record, the bill may be signed and filed at a subsequent period, designated in the record entry, which evidences the consent thus given. This has long been the well settled practice in this State, and we will not now depart from it in order to avoid the real or fancied hardship of a particular case. The entry made by the court on the application of the plaintiff, without the consent of the adverse party, was a mere nullity and could by no means operate to clothe the instrument filed as a bill of exceptions with any of the attributes of legal formality; nor could the above alluded to endorsement have such operation. (See Ellis vs. Andrews, 25 Mo., 327 & cas. cit.; Ruble vs. Thomasson, 20 Mo., 263.)

Judgment affirmed; all concur.

———o———

J. M. Fulkerson, Respondent, *vs.* Geo. W. Houts, Appellant.

1. *Practice—Supreme Court—Bill of exceptions—Signing and filing of.*—A bill of exceptions, not signed by the judge till his office had been abolished by the act of the legislature, and not filed by the clerk, will not be reviewed by the Supreme Court. The bill, until both signed and filed, forms no part of the re-

cord. (Wagn. Stat. p. 1043, § 28 and 1044, § 31.) The term "filed" as employed in the latter section comprehends the entry made by the clerk on the record.

Appeal from Johnson Circuit Court.

Crittenden & Cockrell and Elliott & Blodgett, for Appellant.

Ladue & Fyke and A. W. Rogers & J. M. Shepherd, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit brought in the Common Pleas Court of Johnson county. By an act approved March 25th, 1872, it is provided among other things, that the act approved March 12th, 1867, by which that court was established, should be repealed, and that such repeal should take effect from and after the 1st day of July, 1872; and also that all actions, suits, &c., not transferred by the act of the parties to the Circuit Court of Johnson County on or before the date last mentioned, should by operation of that act be immediately thus transferred. (Laws 1872, pp. 270, 271, §§ 2, 3, 6.)

What purports to be a bill of exceptions in this case is dated and signed July 31st, 1872, by the former judge of the Common Pleas Court, long after that court had been abolished by the force and effect of the above recited act. In addition to that, the alleged bill does not appear to have ever been filed by the clerk. Not only must the bill be signed by the judge, but be filed also "during the term of the court at which it is taken, and not after." (Wagn. Stat., 1043, § 28; *Id.* 1044, § 31; West vs. Fowler, *ante* p. 300 and cases cited.)

An examination of the sections above mentioned will conclusively show, that the bill, until both signed and filed, forms no part of the record. The term "filed" as above employed has a broader signification than the mere indorsement to that effect, and comprehends more especially, in its proper interpretation, the entry made by the clerk on the record, by which

the fact, that the bill has been allowed, is announced and appropriately evidenced. The law has in its wisdom thrown around these instruments, upon which so much depends, these safeguards of authenticity, and we will not be unmindful of its behests.

Judgment affirmed; the other judges concur.

ROBT S. PORTER, Jr. Trustee, Etc., Plaintiff in Error, *vs.* JESSE SCHOFIELD *et al.*, Defendants in Error.

1. *Deeds of trust—Implied power in trustee to sell for debts of cestui que trust.*—A deed of trust which binds the property conveyed for the payment of the beneficiary's debts, without express words vests in the trustee an implied power to sell for that purpose.
2. *Deed of trust—Sale under—Trustee—Description of, in deed.*—A trustee's deed, which describes him as trustee, and is signed by him with the word "trustee" added to his name, and describes the land conveyed by him as part of the lands deeded to him by the deed of trust, contains a sufficient reference to the source of his power to validate his sale and deed.

Error to Lafayette Circuit Court.

Rathbun & Graves, for Plaintiff in Error.

I. The deed from Thomas J. Porter, as trustee, to defendants Hughes and Wasson was void upon its face. 4 Kent Comm. 333 establishes the doctrine: "That when the consent of a third person to the execution of a power is requisite, the consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon, and the instrument or certificate shall be duly proved or acknowledged." (Barbour vs. Carey, 1 Kern., 397.) In the case at bar the power of the trustee, Porter, to convey, emanated from his grantor, and requires the request in writing of the beneficiary, which is an essential condition; no such consent having been obtained or given, the sale and deed to Hughes and Wasson are void, both at law and in equity. (Thornburg vs. Jones, 36 Mo.,

514; Powers vs. Kneckhoff, 41 Mo., 425; Jackson vs. Clark, 7 Johns., 217; Miller vs. Hull, 4 Denio., 104: King vs. Buntz, 11 Barb., 192; Sherwood vs. Reed, 7 Hill., 431.) Equity will not aid defects which are of the very essence of the power, if, as in this case, "the power be executed without the consent of parties who are required to consent to it." (1 Sto. Eq. Juris., § 97; see also Janney vs. Spedden, 38 Mo., 395)

Doniphan & Gaines, and Dunn, for Defendants in Error.

I. In this deed, the grantor describes himself, thus, "I, Thomas J. Porter, trustee," and refers to the subject of the power as follows, "a part of certain lands, heretofore conveyed by one Levi Vancamp to the said Thomas J. Porter, in trust for certain purposes in said deed of trust mentioned, and which said deed of trust is dated March 23rd, A. D. 1865, and is recorded in the recorder's office for said Lafayette county in Deed Book N. No. 1, at pages 398 and 399," referring directly to the subject of the power, and showing that the said Thomas J. Porter had in view the subject of the power in the execution of said deed of conveyance. He executes said deed in the name of "Thomas J. Porter, trustee." (Hazel vs. Hagan, 47 Mo., 277; 2 Sto. Eq. Jur., 1062, and note 3, and cases cited; Collier Will case, 40 Mo., 329; 4 Kent. Comm. [6 Ed.], 334–336.)

II. The deed from Levi Vancamp to Thomas J. Porter invested the latter as such trustee with full power and authority to sell and convey the real estate whenever desired to do so by the said Elvira Porter. If such request was given and said sale assented to by said Elvira Porter, or after said sale was acquiesced in by the said Elvira Porter, such acquiesence was a ratification of said sale, and said trustee is estopped from claiming said land. (Wendell vs. Van Rensalaer, 1 Johns. Ch., 352; Storrs vs. Barker, 6 Johns. Ch., 166 1 Sto. Eq. [4 Ed.,] §§ 385, 388; Huntsucker vs. Clark, 12 Mo., 388; Taylor vs. Zepp, 14 Mo., 482; 3 Wash. Real Pr. [2 Ed.], 452; Welland Canal Co. vs. Hathaway, 8 Wend.,

480; Corning vs. Gould, 16 Wend., 545; Highley vs. Barron, 49 Mo., 103; *Ibid*, 231; 48 Mo., 325.)

H. C. Wallace, for Defendant in Error.

I. By the terms of the deed, the trustee was to collect and receive the rents and profits of the lands therein mentioned, out of which, after paying taxes and expenses of repairs, to pay off said mortgages. These mortgage debts are, by said deed, made a charge on the whole of the lands on both sides of the road, and this charge constituted a trust to sell said lands to pay said debts, if they could not in a reasonable time be paid out of the rents and profits. If the trusts of the deed require a gross sum to be raised, the expression "rents and profits" will not confine the power to the mere rents; and the trustee may sell. The rents and profits are but the means which are not to control, but to yield to, the end to be accomplished. (2 Sto. Eq. Jur. [4 Ed.], §§ 1064, 1064*a*, 1064*b* and notes 2, 3, and cases cited; Ball vs. Harris, 4 Myln & Cr. 264, and cases cited; Hazel vs. Hagan, 47 Mo., 277; Green vs. Belchier, 1 Atkyn, 505; Shrewsbury vs. Shrewsbury, 1 Ves., 233; Allan vs. Backhouse, 2 Ves., & Beam. 64–76)

II. The deed, made by Thomas J. Porter to Hughes & Wasson for the land in controversy, sufficiently shows on its face that it was made in execution of the power conferred on him, as trustee, by the deed of Levi Vancamp aforesaid. The deed not only purports to be made by Thos. J. Porter, as "trustee," but the subject matter of the trust, the land conveyed, sufficiently shows the intention to execute the trust. (Hazel vs. Hagan, 47 Mo., 277; 2 Sto. Eq. Jur., § 1062*a* and note 3 and cases cited; Collier Will Case, 40 Mo., 287; 4 Kent. Com. [6 Ed.], 334, 335, 336.)

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for land in Lafayette county.

Both parties claim under Levi Vancamp and under a deed of trust executed by him to Thomas J. Porter, as trustee, first,

for payment of certain debts, and then in trust for Elvira Porter, wife of John S. Porter, for her life, and at her death for her children. The trusts of this deed are declared in the following language: "To have and to hold the real estate unto the party of the second part, Thomas J. Porter, his heirs and assignees forever; in trust, however, for the following uses and purposes: first, to receive and collect the rents, issues and profits of said property hereby conveyed, and after paying taxes and necessary expenses of repairing same, to pay the mortgage and judgments now on the same to Lafayette county for the use and benefit of common schools, the amount to said county being originally five hundred dollars, borrowed by John S. Porter, who executed a mortgage on part of the above lands to said county of Lafayette, and the said Levi Vancamp was security for him to said county on a promissory note for that sum; and shall also pay the balance of another mortgage on part of said lands originally executed to Levi Vancamp, the grantor herein, by the said John S. Porter to secure to said Levi Vancamp as executor of William S. Vancamp, deceased, the sum of thirty-six hundred and ninety-eight dollars and thirty-four cents, and which said debt and mortgage was assigned by said Vancamp to his daughter, America Nichols, widow of James Nichols, deceased, on which said last mentioned mortgage there is now due about the sum of nine hundred and forty dollars principal and interest; and after payment of these two debts, as above mentioned, to pay over all the net profits, rents, issues, etc., to the said Elvira Porter, party of the third part for and during her natural life and upon her receipt alone and without any control and interference of her husband, John S. Porter; and it is the express understanding and agreement that if the said Elvira Porter desires to sell and convey said real estate, then the said Thomas J. Porter has full power and authority to sell and convey the same or any part thereof, and shall reinvest the proceeds of such sales in other trust property for the use, benefit and interest of the said Elvira Porter herself without any control of her said husband; secondly, from and after the death of the said Elvira Porter, then the said trustee

shall hold whatever real estate he may possess under this deed at that event, to and for the use and benefit of such children of said Elvira as shall be then living, and to her grandchild or children of any such of her children as shall be dead, such grandchild or grandchildren to have only such share as their deceased father or mother would have if living.

* * * * * * * * *

The receipt to him of the said Elvira shall be a sufficient discharge of all liability so far as it goes under this deed of trust. He shall pay to her all profits after the mortgages are paid off, and her written request to said trustee to sell shall be his sufficient authority to do so. Upon the death of said Elvira her children shall then, as stated above, with any grandchildren, if there be such, inherit the said trust fund."

The trustee, Thomas J. Porter, sold and conveyed part of the trust land, being the part for which this suit was brought, to Joseph Hughes and George S. Wasson, for $7,000, on the 21st day of March, 1867, and paid off the debts mentioned in the deed of trust, the rents and profits being wholly insufficient for that purpose, and the balance of the purchase money he appropriated to other debts due by John S. Porter.

In the deed to Hughes and Wasson, he describes himself as trustee and refers to the deed of trust simply by stating that the land conveyed is a part of the same conveyed to him by the said deed of trust, and warrants the title against all persons claiming under himself, and in signing his name added the word "trustee."

Hughes and Wasson afterwards, in October, 1867, conveyed the land in dispute to the plaintiff, in fee.

Afterwards Elvira Porter made an *ex parte* application to the Circuit Court of Lafayette county, to have another trustee appointed, alleging that the said Thomas J. Porter had resigned, and the court on this application appointed the plaintiff Roby S. Porter, trustee, and as such he brought this suit.

There was evidence given on the trial that the defendant, Schofield, took possession under his purchase and made valu-

able and lasting improvements to the amount of seven thousand dollars, and that Elvira Porter had knowledge of the improvements as they were being made, and claimed no title during their progress.

There was no evidence that she made any written request for the trustee, Thomas J. Porter, to sell the land in controversy.

The case was submitted to the court for trial, and numerous instructions were passed upon by the court, which under the view we take, it is unnecessary to recite. The court found and gave judgment for defendants. A motion for a new trial was made by the plaintiff and overruled.

1. The first point raised by this record is whether the trustee, Thomas J. Porter, had power to make the sale to Wasson and Hughes, for the purpose of paying the debts secured by the trust deed, without the written request of Elvira Porter, the *cestui que trust* for life.

The language of the deed does not, in express words, create the power to sell for the payment of the debts; but it is manifestly implied, from the fact that the debts were charged upon the land, and the trustee was directed to pay them out of the rents and profits. As the rents and profits were wholly insufficient for that purpose they must be looked upon only as one means of payment and not as the only means. The property itself being bound for the debts, an implied power exists in the trustee to make the sale for that purpose, without resorting to the tedious and expensive process of a suit in chancery.

This is the settled law in regard to powers raised by implication in wills for payment of debts, and I see no reason why the same language in deeds of trust should not receive the same construction. (See 2. Story's Eq., §§ 1064, 1064*a*.)

By the terms of this deed, the written request of Elvira Porter only applies to a sale for the benefit of herself and children, and not for the payment of debts. The deed expressly declares that when a sale is made on her written request the proceeds of such sale shall be held and invested for her use and benefit for life, and at her death for her children; and

there is no intimation in the deed that the proceeds of such sales are to be appropriated to the debts. The donor seemed to contemplate that the rents and profits alone would be sufficient, without a sale, for the payment of the debts, and made no express provision for a sale to pay them; that is an implied and not an express power.

2. The next point is whether the deed by the trustee, Thomas J. Porter, to Wasson and Hughes was properly executed by him in his fiduciary capacity so as to pass the legal and equitable title to them. The deed describes him as trustee and it is signed by him with the word, "trustee," added to his name, and in the body of the deed the land is described as part of the lands conveyed to him by the deed of trust. This was certainly a sufficient reference to the source of his power to make the sale and deed in question.

Whether the trustee could appropriate the proceeds of the sale to other debts than those secured by the trust, need not be discussed here. The grantees were not required to see that the trustee properly performed his duties in this respect. The title passed to them unincumbered by the trust.

The determination of these points necessarily leads to an affirmance and renders it unnecessary to pass upon the question of estoppel and other numerous questions discussed here by the learned counsel on both sides.

Judgment affirmed. The other judges concur.

END OF JANUARY TERM, 1874, AT JEFFERSON CITY.